

**APPROPRIATE LEGAL PRINCIPLES FOR DETERMINATION OF COMPENSATION  
FOR INFRINGEMENTS OF ABORIGINAL TITLE IN CANADA**

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**BY**

**NNAEMEKA EZEANI**

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## ABSTRACT

This thesis explores the appropriate legal principles that should inform monetary compensation for infringements of Aboriginal title in Canada. The research does not extend to other forms of remedies that may be applicable where Aboriginal title is infringed. The focus is on the unresolved issues of the measure of compensation for infringements of Aboriginal title. This is premised on the fact that Aboriginal title is *sui generis* and the general principles for the determination of compensation for infringements of real property may not readily augur well with the nature of Aboriginal title. The research provides scholarly insight into the possible challenges of determining compensation that will remedy the loss of an Aboriginal group whose land rights and interests are infringed. The main challenge faced in the determination of compensation appears to be the difficulty in the valuation of both the economic and non-economic dimensions of Aboriginal title which should ordinarily determine the amount of compensation payable when it is infringed.

This research aims to provide innovative and original potential solutions to the issue of calculation of compensation for infringements of Aboriginal title. In designing the mechanism that should inform compensation, the work draws from the experiences in Australia, Malaysia, the international arena and some of the extant persuasive principles tenable in Canada. It argues that one of the possible solutions to the issue of compensation is the adoption of a bifurcated approach in the determination of compensation. This approach entails the separation of the incalculable component of the value of Aboriginal title from the calculable component. It contends that the danger of a holistic measurement of the value of the infringed rights and interests in lands subject to Aboriginal title is that the rights and interest may become wholly incalculable. Hence, in practical terms, the solution to that danger is to separate the calculable component from the incalculable component; calculate the value of the calculable component and award a *solatium* for the incalculable component.

This thesis goes on to recommend the use of assessors with indigenous backgrounds in the determination of compensation. This will bring Aboriginal perspective in the determination of compensation. Finally, recognizing that some of the potential solutions may need legislative action, this thesis recommends the enactment of legislation that will set out the appropriate legal principles for the determination of compensation for infringement of Aboriginal title in Canada.

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## TABLE OF CONTENTS

PERMISSION TO USE.....	i
ABSTRACT.....	ii
ACKNOWLEDGMENTS.....	iii
TABLE OF CONTENTS.....	iv
 CHAPTER ONE: GENERAL INTRODUCTION.....	 1
1.1 Introduction.....	1
1.2 The Nature and Theoretical Basis of Remedies.....	7
1.2.1 The Reliance Interest.....	8
1.2.2 The Restitution Interest.....	9
1.2.3 The Expectation Interest.....	10
1.2.4 The Retribution Interest.....	11
1.3 Nature of Aboriginal Title and the Rights it Confers.....	16
1.4 Non-Economic Component of Aboriginal Title.....	22
1.5 Choice and Quantum of Remedies for Infringement of Aboriginal Title.....	24
1.6 Methodology and Structure.....	27
 CHAPTER TWO: CRITICAL ANALYSIS OF THE PRINCIPLES FOR THE DETERMINATION OF COMPENSATION FOR INFRINGEMENT OF ABORIGINAL TITLE IN CANADA.....	   32
2.1 Introduction.....	32
2.2 Royal Proclamation of 1763.....	33
2.3 <i>Indian Act</i> , RSC 1985.....	39
2.4 <i>Delgamuukw</i> : “Variabilities” that Determine Compensation for Infringement of Aboriginal Title.....	 50
2.4.1 Nature of Aboriginal Title.....	51
2.4.2 Nature of Infringement.....	55
2.4.3 Severity of Infringement.....	58
2.4.4 Accommodation of Aboriginal Interest.....	61

2.5 Specific Claims Tribunal Act.....	63
2.6 Modern Treaties.....	66
2.7 <i>Expropriation Act</i> .....	71
2.8 <i>Métis Settlement Act (MSA)</i> .....	76
2.9 <i>First Nation Land Management Act (FNLMA)</i> .....	78
2.10 Conclusion.....	79

### CHAPTER THREE: A SURVEY OF THE PRINCIPLES FOR THE DETERMINATION OF COMPENSATION FOR INFRINGEMENTS OF INDIGENOUS LAND RIGHTS AND INTERESTS IN OTHER JURISDICTIONS AND UNDER THE INTERNATIONAL ARENA.....

3.1 Introduction.....	80
3.2 The Experience in Australia.....	81
3.2.1 Native Title in Australia (An Overview).....	81
3.2.2 Principles for Determination of Compensation under the <i>NTA</i> .....	86
3.2.3 Reflections on Griffiths.....	93
3.3 The Experience in Malaysia.....	97
3.3.1 Native Title in Malaysia (An Overview).....	97
3.3.2 Principles for Determination of Compensation upon Extinguishment of Native Title in Malaysia.....	98
3.3.3 Reflections on the Malaysian Compensation Regime.....	101
3.4 Determination of Compensation for Violation of Indigenous Land Rights under the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) 2007.....	103
3.4.1 Redress for Infringement of Land Rights under UNDRIP.....	103
3.4.2 Principles for the Determination of Compensation Under UNDRIP.....	108
3.5 Conclusion.....	110

### CHAPTER FOUR: CONCLUSION.....

4.1 Summary of Findings.....	112
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4.2 Possible Framework for the Determination of Compensation for Infringements of Aboriginal Title in Canada.....	118
4.2.1 Development of a Legislative Scheme.....	118
4.2.2 Bifurcated Approach of Calculation of Compensation.....	121
4.2.3 Assessors.....	129
4.2.4 Fiduciary Principles.....	131
 BIBLIOGRAPHY.....	 133

## CHAPTER ONE: GENERAL INTRODUCTION

### 1.1 Introduction<sup>1</sup>

The Supreme Court of Canada (SCC) per Lamer CJ in *Delgamuukw v British Columbia* affirmed that infringements of Aboriginal title are compensable.<sup>2</sup> However, the court did not examine the appropriate legal principles for the determination of compensation for infringements of Aboriginal title because they received no submissions on it.<sup>3</sup> The only clue given by the court is that “the amount of compensation payable will vary with the nature of the particular Aboriginal title affected and with the nature and severity of the infringement and the extent to which Aboriginal interests were accommodated.”<sup>4</sup> The infringement of an Aboriginal title gives the Aboriginal community a right to be compensated, but the legal principles for the determination of the level of compensation are yet to be determined. Thus, the decision of the SCC in *Delgamuukw* may have added even more uncertainty to an uncertain economic climate.<sup>5</sup>

The expectation was that the SCC would bring clarity to the broader issue of choice and quantum of remedies due to an Aboriginal group whose land rights are infringed when the opportunity presents itself. The right opportunity arguably came up in the case of *Tsilhqot'in Nation v. British Columbia*.<sup>6</sup> However, it appears that *Tsilhqot'in Nation* increased the uncertainty. In that case, McLachlin C.J. held that:

“[O]nce [Aboriginal] title is established, it may be necessary for the Crown to reassess prior conduct in light of the new reality in order to faithfully discharge its fiduciary duty to the title-holding group going forward. For example, if the Crown begins a project without consent prior to Aboriginal title being established, it **may**

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<sup>1</sup> This Chapter briefly sets out some of the complexities with the calculation of compensation for infringement of Aboriginal title. Hence, some of the points made at this stage shall be further explored in the main body of the thesis.

<sup>2</sup> *Delgamuukw v. British Columbia* (1997) 3 S.C.R. 1010 at para 166.

<sup>3</sup> *Ibid* at para 169.

<sup>4</sup> *Ibid* at para 169.

<sup>5</sup> J Keith Lowes, “Questions of Compensation: An Overview of Economic Impacts” in Owen Lippert, ed, *Beyond the Nass Valley: National Implications of the Supreme Court's Delgamuukw Decision* (Vancouver: The Fraser Institute, 2000) at 424.

<sup>6</sup> *Tsilhqot'in Nation v. British Columbia* [2014] 2 SCR 256.



be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing.”<sup>7</sup>

The SCC did not explain the particular remedies applicable in a situation where a Crown’s project which infringes Aboriginal title is allowed to go on in spite of the establishment of the title.<sup>8</sup> In general terms, the SCC held that “the usual remedies that lie for breach of interests in land are available [to infringement of Aboriginal title], adapted as may be necessary to reflect the special nature of Aboriginal title and the fiduciary obligation owed by the Crown to the holders of Aboriginal title.”<sup>9</sup> The different options of remedies that may come to mind include restitution of land, reallocation of a different land (with similar quality, size, and location), injunction and compensation. One may argue that the most appropriate remedy that may not adversely affect third parties in such a situation is the compensation of the Aboriginal community. However, the SCC in that case neither commented on compensation nor determined the appropriate legal principles that will inform same.

This thesis explores the appropriate legal principles for the determination of compensation for infringement of Aboriginal title in Canada, as considered within the existing judicial approach to Aboriginal title. The scope of the work is restricted to compensation for two reasons. First, the thesis strives to build on the work the SCC started in *Delgamuukw* when they held that infringements of Aboriginal title are compensable without giving the mechanism for the determination of compensation. Second, compensation is arguably a remedy that may balance the interest of the affected Aboriginal group(s), the Crown and third parties. This thesis does not argue that other forms of remedies are not viable.

The remainder of this chapter surveys the existing literature on the point, the general interests remedies seek to protect, and the general nature of Aboriginal title to set the thesis up for the rest

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<sup>7</sup> *Ibid* at para 92 (Emphasis added).

<sup>8</sup> Dwight Newman, “The Top Ten Uncertainties of Aboriginal Title after *Tsilhqot’in*” (2017) Online: Fraser Institute. Available at <https://www.fraserinstitute.org/sites/default/files/top-ten-uncertainties-of-aboriginal-title-after-tsilhqotin.pdf> at 32.

<sup>9</sup> *Tsilhqot’in Nation*, *supra* note 6 at para 90.

of the argument. The remaining chapters turn to various contexts for persuasive ideas that might be used in assessing compensation.

Owing to the gap in the compensation regime for infringements on Aboriginal title in Canada, there have been suggestions in the existing literature as regards the appropriate mechanism that will make compensation meet the honour and good faith of the Crown. Sam Adkins and others contend that compensation for infringement of Aboriginal title may uphold the honour of the Crown where Aboriginal perspectives are taken into account.<sup>10</sup> Consequently, an approach that will require the active participation of Aboriginal groups in the formulation and modification of principles as well as deep consultation with an Aboriginal community during the valuation of compensation.<sup>11</sup>

The scholars further submit that modern treaties give some insight of how Aboriginal perspectives could be assessed and valued.<sup>12</sup> An example is the *Inuvialuit Final Agreement*<sup>13</sup> where monetary compensation for expropriation is a secondary option.<sup>14</sup> The primary obligation of the Crown in that agreement is to provide alternative lands that are suitable in the Western Arctic Region in place of expropriated lands.<sup>15</sup> Where replacement of land becomes impossible, monetary compensation as contemplated by the *Expropriation Act*<sup>16</sup> of Canada can be explored.<sup>17</sup> However, higher valuation can be agreed by parties.<sup>18</sup> The *Inuvialuit Final Agreement* is just an example of many other modern treaties that have different principles as regards compensation. Some other scholars oppose the use of principles drawn from the *Expropriation Act* for measurement of compensation where it concerns Aboriginal title.<sup>19</sup>

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<sup>10</sup> Sam Adkins *et al*, “Calculating the Incalculable: Principles for Compensating Impacts to Aboriginal Title” (2016) 54 Alta. L. Rev. 351 at 360. The submission of the scholars here comes with the presumption that for compensation to be deemed appropriate and fair with respect to infringement of Aboriginal title, it must uphold the honour of the Crown. The basis of this contention may be traced to several paragraphs of the decision of the SCC in *Delgamuukw*. This will be explored further at a later part of this section.

<sup>11</sup> *Ibid* at 360.

<sup>12</sup> *Ibid* at 365.

<sup>13</sup> *Inuvialuit Final Agreement*, 18 August 1979, (entered into force 25 July 1984).

<sup>14</sup> Adkins *et al*, *supra* note 10 at 365.

<sup>15</sup> *Ibid* at 365.

<sup>16</sup> *Expropriation Act*, RSC 1985 at s 26 (2).

<sup>17</sup> Adkins *et al*, *supra* note 10 at 365.

<sup>18</sup> *Ibid* at 365.

<sup>19</sup> Robert Mainville, *An Overview of Aboriginal and Treaty Rights and Compensation for their Breach* (Saskatoon: Purich Publishing, 2001). Robert Mainville as at the time of writing this thesis is a judge in the Court of Appeal of

Robert Mainville proposes six principles that should inform compensation for infringement of Aboriginal and treaty rights as follows:<sup>20</sup>

1. Compensation should take into account the principles of fiduciary law.<sup>21</sup>
2. Impacts on the Aboriginal community concerned and the benefits derived by the Crown and third parties from the infringement should be determined.<sup>22</sup>
3. Compensation should be determined by uniform rules across Canada in accordance with federal common law.<sup>23</sup>
4. Although Compensation is the duty of the Crown, it may be assumed by third parties in some circumstances.<sup>24</sup>
5. Compensation may be provided through structured compensation schemes.<sup>25</sup>
6. Compensation should be awarded for the benefit of the affected Aboriginal community as a whole.<sup>26</sup>

After assessing the frailties of expropriation law in dealing with land that has no ascertainable market value, Mainville proposes that compensation for breaches and infringements of Aboriginal and treaty rights, including Aboriginal title, should be based on the principles governing damages for breach of fiduciary duty rather than principles of fair compensation for expropriation.<sup>27</sup> The fiduciary law approach of Mainville is worth exploring because it recognizes the *sui generis* nature of Aboriginal title. This is because the fiduciary law approach has the potential to go beyond the “market value” of the infringed Aboriginal title to other considerations like the nature of the Aboriginal title, nature of the infringement, the severity of the infringement and the extent to which the rights and interests of the affected Aboriginal group have been accommodated. It is therefore pertinent to look into the fiduciary law approach to see the different circumstances that may arise

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Quebec. Before his elevation to the Bench in 2009 (Federal Court), he practiced law in Montreal and represented First Nations for several years. This particular book addresses the intricate question of compensation for infringement of Aboriginal and treaty rights.

<sup>20</sup> *Ibid* at 104-121.

<sup>21</sup> *Ibid* at 104.

<sup>22</sup> *Ibid* at 109.

<sup>23</sup> *Ibid* at 115.

<sup>24</sup> *Ibid* at 116.

<sup>25</sup> *Ibid* at 124.

<sup>26</sup> *Ibid* at 125.

<sup>27</sup> *Adkins et al*, *supra* note 10 at 361. See also Mainville, *supra* note 19 at 105.

as a result of using it as one of the principles for the determination of compensation. However, basing compensation for infringement of Aboriginal title on the “fiduciary law approach” may not in itself provide practical explanation with respect to the mechanism for calculation of compensation for both the tangible and intangible losses occasioned by an infringement. This thesis proposes a mechanism for the calculation of compensation for infringement of Aboriginal title in Canada in practical circumstances.

Although the SCC has not extensively determined the appropriate legal principles to inform compensation for infringement of Aboriginal title, the court may have set the acceptable legal standard for such compensation. The acceptable standard for compensation to be deemed appropriate may be said to be the “honour of the Crown.” This assumption is deducible from several paragraphs of the decision of the SCC in *Delgamuukw*.<sup>28</sup> While clarifying the likely quantum of appropriate compensation, the SCC held that compensation for infringement of Aboriginal title should not be equated with the price of a fee simple rather it “must be viewed in terms of the right and in keeping with the honour of the Crown.”<sup>29</sup> This standard employed by the SCC may not have in anyway made the quantum of compensation clearer because what will amount to the fulfillment of the honour of the Crown in practical circumstances may vary. It is a fluid concept which may mean different things in different practical circumstances.

In principle, the honour of the Crown has been discussed by courts and jurists. First, it is pertinent to note that the honour of the Crown is always at stake whenever the Crown is dealing with Aboriginal peoples.<sup>30</sup> Section 35 of the *Constitution Act 1982* contemplates that the Crown is to be held accountable to a high standard of honourable dealing where Aboriginal and treaty rights are concerned.<sup>31</sup> Historically, the concept of the honour of the Crown evolved in Britain, and it was invoked to give protection against the Crown from inadvertently and unduly using its powers to the detriment of private parties.<sup>32</sup> Thus, the principle presupposes that the servants of the Crown must conduct themselves with honour while acting on behalf of the Crown.<sup>33</sup>

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<sup>28</sup> *Delgamuukw*, *supra* note 2 at paras 169 & 203.

<sup>29</sup> *Ibid* at para 203.

<sup>30</sup> *R. v. Badger*, [1996] 1 S.C.R. 771 at para 41.

<sup>31</sup> Jack Woodward, *Native Title* (Toronto: Carswell Thompson Professional Publishing, 1989) at 74.

<sup>32</sup> Jamie D. Dickson, *The Honour and Dishonour of the Crown: Making Sense of Aboriginal Law in Canada* (Saskatoon: Purich Publishing, 2015) at 27.

<sup>33</sup> *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 at para 65.

In Aboriginal law in Canada, the principle of honour of the Crown arises from “the Crown’s assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people.”<sup>34</sup> Consequently, in all dealings of the Crown with Aboriginal peoples, “from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably.”<sup>35</sup>

In *Haida Nation v. British Columbia (Minister of Forests)* the SCC held that the duty that comes with the honour of the Crown depends on the circumstances of the case.<sup>36</sup> For instance, a fiduciary duty accrues where the Crown assumes discretionary control over Aboriginal interests.<sup>37</sup> The honour of the Crown gives rise to different kinds of duties in treaty making and interpretation. The Crown has a duty to act with integrity and avoid “sharp dealing.”<sup>38</sup> Likewise, the honour of the Crown gives the Crown the duty to consult an Aboriginal group where the decision of the government might have an impact on their rights.<sup>39</sup> In fact, the concept of reconciliation which has been established to be the fulcrum of Section 35 of the *Constitution Act, 1982* was held in *Haida Nation* to flow from the principle of the honour of the Crown.<sup>40</sup>

In the context of compensation for infringement of Aboriginal title, the SCC held in *Delgamuukw* that “in keeping with the duty of honour and good faith on the Crown, fair compensation will ordinarily be required when [A]boriginal title is infringed.”<sup>41</sup> Thus, the duty of the Crown to compensate an Aboriginal group whose interest in their land has been impaired by the Crown also flows from the honour of the Crown. That said, it goes without saying that the quantum of compensation and the principles that inform same should ordinarily flow from the honour of the Crown. This happens to be the view of the SCC as regards the standard of compensation.<sup>42</sup>

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<sup>34</sup> *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 at para 32.

<sup>35</sup> *Ibid* at para 17.

<sup>36</sup> *Ibid* at para 18.

<sup>37</sup> *Ibid* at para 18. See also *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79, at para 79.

<sup>38</sup> *Badger*, *supra*, note 30 at para 41.

<sup>39</sup> Dwight G Newman, *Revisiting the Duty to Consult Aboriginal Peoples*, Revised ed (Saskatoon: Purich Publishing, 2014) at 15.

<sup>40</sup> *Haida Nation*, *supra* note 34 at para 32.

<sup>41</sup> *Delgamuukw*, *supra* note 2 at para 169.

<sup>42</sup> *Ibid* at para 203.

In *R. v. Marshall; R. v. Bernard*<sup>43</sup> the SCC held that to uphold the honour of the Crown in consideration of issues arising from Aboriginal title, both the Aboriginal perspective and the common law perspective must be considered.<sup>44</sup> Flowing from this, one may argue that for compensation to be consistent with the honour of the Crown, both Aboriginal and common law perspectives should be considered.

The principle of the honour of the Crown (as briefly set out above) is not very clear. This gives an insight into the complex circumstances that may arise where the concept is applied as the appropriate standard for compensation in practical circumstances. What will be the test to evaluate whether or not compensation is in line with the Crown's duty to act honourably? A plausible answer to this question may be that the compensation should be just and stand as a recompense as far as money can go for the economic and non-economic losses of the Aboriginal group affected. This thesis proposes the principles that should be adopted to arrive at such compensation.<sup>45</sup>

## 1.2 The Nature and Theoretical Basis of Remedies

Before delving into the issue of the appropriate legal principles for the determination of compensation for infringements of Aboriginal title in Canada, it is pertinent to broadly examine the underlying aim of remedies. The fundamental objective that remedies are meant to fulfill should ordinarily determine the choice and quantum of remedies. Hence, the discussion here will show that the various interests remedies seek to protect determine the choice and quantum of remedies.

The principle of *ubi jus, ibi remedium* is to the effect that for every right, there must be a remedy.<sup>46</sup> Consequently, the need for a remedy arises upon the infringement of a right by another. One can argue that although rights and remedies mean different things (and they may receive different

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<sup>43</sup> *R. v. Marshall; R. v. Bernard* [2005] SCC 43.

<sup>44</sup> *Ibid* at para 46.

<sup>45</sup> For the avoidance of repetition the methodology and structure that this work adopts to arrive at the proposed principles in this work has not been set out yet. It is set out in the final section of this chapter. That section will explain the methodology that this work adopts and will give a broad overview of the different chapters and the proposal made thereafter.

<sup>46</sup> Ted Sampsell –Jones, “The Myth of *Ashby v. White*” (2010) 8:10 University of St. Thomas Law Journal 40. See also *Ashby v. White* (1703) 92 ER 126. The principle of *ubi jus, ibi remedium* emanated from Roman law, but now known to common law and equity.

emphasis), the two concepts are intrinsically linked.<sup>47</sup> This is because remedies emerge as a result of infringements of rights and the value of rights may reflect in the choice and quantum of remedies given for their breach. Also, remedies appear to be legal protection for the existence of rights. This view presupposes that rights and remedies as inseparable concepts.<sup>48</sup>

However, in order not to delve into the argument of whether or not the two concepts are inseparable, it is my view that they are at least complementary principles. The necessity for remedies springs from the existence of rights; and the nature, value, and measure of rights may reflect in the type and measure of remedies granted for the rights.

Remedies can be argued to play different roles in different circumstances of infringements, depending on the rights at stake and the *interests sought to be protected*. Hence, an examination of the different possible interests that may arise to be protected in different circumstances seems to be the best approach towards the discovery of the nature and basis of remedies in law. Over the years, scholars have examined the different interests that can inform the basis, choice, measure, and extent of remedies in different circumstances of infringements. Some of these interests include:

1. The reliance interest
2. The restitution interest
3. The expectation interest
4. The retribution interest<sup>49</sup>

### **1.2.1 The Reliance Interest**

Remedies based on the reliance interest reflect the principle of corrective justice.<sup>50</sup> The Aristotelian principle of corrective justice is to the effect that a person who is responsible for a wrongful loss

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<sup>47</sup> Ken Cooper-Stephenson, “Holism and Harmony in the Law of Remedies” in Jeff Berryman and Rick Bigwood, *The Law of Remedies: New Directions in Common Law*, eds. (Toronto: Irwin Law Inc, 2010) at 257.

<sup>48</sup> Jeffery Berryman, *The Law of Equitable Remedies* (Toronto: Irwin Law Inc, 2000) at 9.

<sup>49</sup> Jamie Cassels & Elizabeth Adjin-Tettey, *Remedies: The Law of Damages*, 3<sup>rd</sup> ed (Toronto: Irwin Law Inc, 2014) at 50.

<sup>50</sup> *Ibid* at 50.

has an obligation to make good that loss to its sufferer.<sup>51</sup> This has been accepted by some scholars to be the rationale for remedies in tort, contract (in some cases), and unjust enrichment.<sup>52</sup> Aristotle submits that where injustice occurs, it creates an inequality which gives the infringer an advantage or gain of some sort and a disadvantage or loss on the victim.<sup>53</sup> Therefore, the principle of corrective justice uses remedies to restore equality between the infringer and the victim. For there to be equality (perhaps, fairness), the judge has to rectify the situation by imposing the loss on the wrongdoer through the nullification of his gain and restoration of the victim's loss.<sup>54</sup> Corrective justice sees the parties as equals, and for there to be justice, there should be a restoration of their equality.<sup>55</sup> That said, the aim of remedies by reliance interest is to restore the victim of infringement to the position he would have been had the wrong not been done.<sup>56</sup>

Although remedies by reliance interest reflect the principle of corrective justice, it only pays attention to the loss of the victim of wrong and not the gain of the infringer. Thus, remedies based on this interest can be summed up in the maxim; *restitutio in integrum*. This principle “looks back” to restore the victim of infringement to the position he would have been had the wrong not occurred.<sup>57</sup>

### 1.2.2 The Restitution Interest

This interest is similar to the reliance interest to the extent that they are both backward looking. However, instead of looking at the loss of the victim of wrong, it considers the gain of the infringer.<sup>58</sup> Although, there may be a likelihood of restoring the victim to his earlier position, the goal of remedies based on restitution is not necessarily to put the victim of an infringement back

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<sup>51</sup> Zoë Sine, “Concerns about Corrective Justice” (2013) XXVI: 1 Canadian Journal of Law and Jurisprudence 137.

<sup>52</sup> *Ibid* at 137. See also Cassels & Adjin-Tettey, *supra* note 49 at 50. The reliance measure of damages is only resorted to in contract in circumstances that damages based on expectation interest are not available. There is predominance of expectation measure of damages in contract because by the nature of contract, the act or promise of an infringer in a contract creates an expectation on the mind of the victim of loss which remedy seeks to protect. The “Expectation Interest” section below will explain further.

<sup>53</sup> Thomas C Brickhouse, “Aristotle on Corrective Justice” (2014) 18 J Ethics 187 at 188.

<sup>54</sup> *Ibid* at 188.

<sup>55</sup> Douglas Sanderson, “Redressing the Right Wrong: Argument from Corrective Justice” (2012) 62:1 University of Toronto Law Journal 93 at 105.

<sup>56</sup> L. L. Fuller & William R. Jr. Perdue, “Reliance Interest in Contract Damages (1)” (1936) 46 Yale L. J. 52 at 54.

<sup>57</sup> Cassels & Adjin-Tettey, *supra* note 49 at 60.

<sup>58</sup> *Ibid* at 7.



to the position he would have been had the wrong not occurred.<sup>59</sup> It aims to take away the gain on the infringer as a result of his wrongdoing (unjust enrichment).<sup>60</sup> Thus, remedies based on this interest are not compensatory but rather aimed to prevent unjust enrichment.<sup>61</sup> This approach to remedies is also in line with the principle of corrective justice as it aims at taking away the gain of the infringer and giving back to the victim. To a very great extent, it may restore balance in the relationship between the victim and the wrongdoer. However, heavy reliance on restitution interest in some circumstances may either leave the victim in a better situation than he was before the wrong or not restore him to the position he would have been had the wrong not occurred. For instance, in a situation where the gain of the infringer as a result of his wrong outweighs the loss of the victim; stripping the infringer's gain and giving same to the victim may put him (the victim of wrong) in a better position than he would have been absent the wrong. Conversely, where the loss of the victim outweighs the gain of the infringer, stripping the infringer of the gain and giving same to the victim may not restore the victim to the original position before the wrong. A practical example may help illustrate the point. For instance, if a victim of wrong has a real property which he plans to lease (for rent) but his interest in the property was deprived by an infringer who takes control of the property without putting it up for rent. In the event that it is determined that the infringer is liable of infringement and remedies based on restitution interest is resorted to, the probable consequence is that the victim of wrong's interest would be restored to him without more (being the only gain made by the infringer). The restoration of his rights and interest in the property in this instance does not cover his loss of rent for the period of deprivation. This can also be the case in the opposite direction where the infringer makes a gain that outweighs the victim of wrong's loss. The obvious explanation for these plausible circumstances is that in many cases, the victim's loss and the defendant's gain may not be equal.<sup>62</sup>

### **1.2.3 The Expectation Interest**

Remedies based on expectation interest considers that the infringer's action (express or implied) before the wrong has given the victim of wrong an expectation (which may be called a right).

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<sup>59</sup> *Ibid* at 7.

<sup>60</sup> *Ibid* at 7.

<sup>61</sup> *Ibid* at 7.

<sup>62</sup> Sam Doyle & David Wright, "Restitutionary Damages – The Unnecessary Remedy" (2001) 25 *Melb. U. L. Rev.* 1 at 2.

Hence, in the absence of the wrong of the infringer, the victim of the wrong would have ordinarily attained the position of his expectation. Expectation interest is usually used as the basis of remedies for breach of contract actions as remedies in these kinds of actions secure the benefits of the contract for the victim of the breach.<sup>63</sup> Remedies of this perspective represent the principle of distributive justice.<sup>64</sup> With these kinds of remedies, the wealth of the parties are redistributed to meet the expectation of the victim of wrong; which expectation was aroused by the action or promise of the wrongdoer.<sup>65</sup>

#### **1.2.4 The Retribution Interest**

Sometimes, the goal of remedies is neither to compensate the victim of wrong for his injury nor to strip the infringer of his gain. Remedies based on retribution aims at punishing the infringer for his wrong.<sup>66</sup> These kinds of remedies are called punitive or exemplary remedies.<sup>67</sup> The interest protected here is a larger interest of the public and not the private interests of the victim of wrong and the wrongdoer.<sup>68</sup> This approach reflects the principle of retributive justice.<sup>69</sup> The theory of retributive justice is always linked to criminal wrongs where a desire to punish the offender has been argued to be the intuitive response of the public.<sup>70</sup> However, there are instances in civil wrongs that based on moral outrage or the nature of infringement; it may become pertinent to punish the wrongdoer for his wrong. A good example could be where the act of the wrongdoer is exceptionally reprehensible, and there is a need to pass a message of denunciation, retribution, and deterrence.<sup>71</sup> Punitive remedies may be awarded in addition to the remedies pursuant to any of the interests earlier discussed.

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The above can be said to be the major interests that remedies seek to protect. Of course, there are other interests that are worthy of protection depending on the circumstances of a particular case.

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<sup>63</sup> Cassels & Adjin-Tettey, *supra* note 49 at 18.

<sup>64</sup> Fuller & Perdue, *supra* note 56 at 56.

<sup>65</sup> Cassels & Adjin-Tettey, *supra* note 49 at 8.

<sup>66</sup> *Ibid* at 7.

<sup>67</sup> *Ibid* at 7.

<sup>68</sup> *Ibid* at 7.

<sup>69</sup> *Ibid* at 8.

<sup>70</sup> Jan-Willem Van Prooijen, "Retributive Versus Compensatory Justice: Observers' Preference for the Punishing in Response to Criminal Offences" (2010) 40: European Journal of Social Psychology 72 at 73.

<sup>71</sup> *Whiten v. Pilot Insurance Co.* (2002) 1 SCR 595 at para 43.

A good example is what I may call *the protection of the res interest*. The interest to protect the *res* (the subject matter of a case) may even come up before the determination that there is an infringement (wrong) in the first place.<sup>72</sup> A good illustration of this point could be seen in a real property trespass case where the infringer is already developing a property which the victim of wrong asserts rights and interests. The victim of wrong can file an application in court for an injunction restraining the infringer from further developing the property pending the determination of the case. This application will have the effect of protecting the *res* (the property) pending the determination of the case. This interest informs remedies like interim and interlocutory injunctions (equitable remedies) for parties to a suit to maintain *status quo* pending a specified period or the determination of the case.<sup>73</sup> That said, there may be other interests that can inform remedies, however, my subsequent analysis will be based on the four major interests discussed above.

How do these interests affect remedies? Each of these interests sought to be protected tends to reflect a certain kind of justice.<sup>74</sup> The justice (s) sought to be reflected in determining the remedy for a particular wrong may determine the choice and measure of remedy in that case. Thus, these interests appear to be the determinants of *choice* and *quantum* of remedies. Although the quantum of remedies may seem more intricate than the choice, the choice of remedies possesses its peculiar complications. Hence, the choice of remedies needs to receive considerable attention.

The choices available in remedies can be broadly categorized into *compensatory* and *non-compensatory remedies*.<sup>75</sup> Compensation is an award of money which as far as money can go is equivalent to the loss or expectation of the victim of wrong.<sup>76</sup> The goal of compensation is to provide for the victim of wrong something equivalent in value to that which has been lost due to

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<sup>72</sup> A good illustration of this point could be seen in a real property trespass case where the infringer is already developing a property which he victim of wrong asserts rights and interests. The victim of wrong can file an application in court for an injunction restraining the infringer from further developing the property pending the determination of the case. This application will have the effect of protecting the *res* (the property) pending the determination of the case.

<sup>73</sup> Berryman, *supra* note 48 at 13 and 33.

<sup>74</sup> It is also pertinent to state that some of the remedial mechanisms discussed so far are more applicable to some areas of law. For instance, remedies based on the reliance interest are primarily used in tortious actions as opposed to actions of breach of contract that predominantly rely on remedies based on the expectation interest.

<sup>75</sup> Cassels & Adjin-Tettey, *supra* note 49 at 3.

<sup>76</sup> Andrew Burrows, *Remedies for Tort and Breach of Contract* 3<sup>rd</sup> ed. (Oxford: Oxford University Press, 2004) at 29.

the actions or omissions of the infringer.<sup>77</sup> Compensation, therefore, puts the victim of wrong in a position he would have occupied had the wrong not been done (*reliance interest*) or in a position he reasonably expects to occupy had the wrong not been done (*expectation interest*). Consequently, compensation reflects the justices seen in the protection of two of the interests earlier analyzed. Further, one may conclude that the interests (s) sought to be protected informs the choice of compensatory remedies.

The second category of the choice of remedies is *non-compensatory remedies*. These kinds of remedies are still largely determined by some of the interests earlier analyzed. Non-compensatory remedies, unlike the compensatory ones, do not seek to put the victim of loss in a position he ought to have been, or he expects to be had the wrong not been done. Rather, these kinds of remedies seek to do other things like stripping the infringer of his gain (*restitution interest*) or punishing the wrongdoer (*punitive interest*). There are other kinds of non-compensatory remedies such as equitable remedies of specific performance and injunctive relief.<sup>78</sup> Again, the determinant of the choice of non-compensatory remedies appears also to be the interest sought to be protected.

After a choice of remedy has been made, the more complicated issue may be its measurement. For compensatory remedies, the general rule seems to be the assessment in a lump sum of all the loss or expectation of the victim of wrong, depending on the interest sought to be protected.<sup>79</sup> Different factors may make the assessment of compensation complex. The degree of complexity will depend on the type of loss or expectation sought to be assessed. For example, economic losses or expectations may have their complexities; but intangible losses or expectations may even prove to be more complex. On the other hand, restitutionary remedies are measured by the wrongful gain of the infringer regardless of the loss of the victim of wrong.<sup>80</sup> Ascertaining the actual gain of the infringer for the purpose of restoration to the victim may also be intricate in some circumstances, especially circumstances whereby the gain of the infringer is intangible. For punitive remedies,

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<sup>77</sup> Rodney C. Roberts, "The Counterfactual Conception of Compensation" (2006) 37: 3-4 *Metaphilosophy* at 414.

<sup>78</sup> Burrows, *supra* note 76 at 10. Andrew Burrows in his book makes a distinction between compensatory remedies and remedies that seek to compel a performance or prevent a wrong. For instance, the aim of the equitable remedy of specific performance is not to compensate the victim of the wrong, but to compel the infringer to do what for instance by a contract he has the obligation to do. Likewise, the underlying aim of mandatory injunction in some circumstances is to compel the infringer to do a thing and in other instances may restrain him from doing something.

<sup>79</sup> *Ibid* at 175. See also *Fitter v. Veal* (1701) 12 Mod Rep 542.

<sup>80</sup> Cassels & Adjin-Tettey, *supra* note 49 at 282.

there is no scientific method for the determination of its measurement.<sup>81</sup> However, the punitive damages should be able to achieve its purpose of punishment and deterrence.<sup>82</sup>

Trespass to real property, negligence causing damage to the property or expropriation of property are generally compensable.<sup>83</sup> Of course, the interest sought to be protected, which should eventually determine the quantum of compensation may vary depending on the circumstances surrounding the case. However, the general trend in trespass or negligence on property cases is that the courts award the diminishing value of the property or the cost of repair.<sup>84</sup> This trend appears to be compensation based on the reliance interest. In other circumstances, for instance, where the victim of wrong intends to use the property (for instance where he intends to rent it), the court may award damages for lost use of the property.<sup>85</sup> This appears to be more in line with the protection of expectation interest.

In cases of expropriation of fee simple estate, the general trend is award of compensation based on the market value of the property which would ordinarily be paid by a willing purchaser to a willing vendor.<sup>86</sup> This seeks to reproduce in monetary form the value of the property of the victim of expropriation. This also appears to be more in line with the reliance interest. Thus, the focus on the determination of damages for an infringement of real property is the *loss of the victim of wrong* and not necessarily the gain of the infringer.<sup>87</sup> Therefore, compensation for the loss in property infringements may protect the reliance interest or expectation interest, depending on the facts and circumstances surrounding the case.

Further to the above analysis, the goal, nature, choice, and quantum of remedies may be said to revolve around the interest (s) sought to be protected. Hence, it appears that the most convenient place to start in the determination and assessment of remedies for infringements is to ascertain the interest sought to be protected. What could be the determinant of the interest sought to be

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<sup>81</sup> *Ibid* at 337.

<sup>82</sup> *Ibid* at 337.

<sup>83</sup> *Ibid* at 89.

<sup>84</sup> *Ibid* at 90. See also *Rossiter v Swartz*, 2013 ONSC 159 at para 26.

<sup>85</sup> *Ibid* at 90.

<sup>86</sup> *Spencer v Commonwealth* (1907) 5 CLR 418 at 432.

<sup>87</sup> *Cassels & Adjin-Tettey*, *supra* note 49 at 90.

protected? The possible factors that could determine the interest sought to be protected may be the nature of the rights infringed, the nature of the infringement, the degree of infringement and perhaps the relationship between the infringer and the victim of wrong.

The nature of rights infringed and the nature of infringement play a very big role in the determination of the interest sought to be protected. For instance, the preceding analysis shows that remedies based on the reliance interest are usually adopted in tort while that of expectation interest is predominant in contract.<sup>88</sup> Also, the appraisal above shows that there is a trend where the infringement sought to be remedied concerns real property. Furthermore, the nature of infringement can work together with the degree of infringement to protect an entirely different interest. For instance, I earlier submitted that there are civil wrongs that based on moral outrage, the nature of the infringement and the degree of infringement; it may become pertinent to punish the wrongdoer for his wrong. Remedies to be awarded in such a situation may seek to protect the general interest of the public and not the private interests of the victim of wrong and the wrongdoer.<sup>89</sup> Also, the relationship between the infringer and the victim of wrong may determine the interest sought to be protected. The relationship could be contractual, fiduciary or the general “neighbor relationship” demonstrated in the tort of negligence.

By extension, for one to determine the remedial interest (s) to be protected upon the infringement of Aboriginal title, it may be pertinent to ascertain the nature of the Aboriginal title, the nature of infringements and the relationship between Aboriginal peoples and the Crown in relation to Aboriginal title. These factors will be considered in detail in the next chapter. At this juncture, it is a convenient starting point to examine the nature of Aboriginal title and the right it confers. Since rights and remedies are intrinsically linked, the understanding of the nature of Aboriginal title and the rights it confers will give an insight on the choice and quantum of remedies.

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<sup>88</sup> This does not imply that in appropriate circumstances remedies based on expectation interest are not used in tort or reliance interest in contract.

<sup>89</sup> Cassels & Adjin-Tettey, *supra* note 49 at at 7.

### 1.3 Nature of Aboriginal Title and the Rights it Confers

...[A]boriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures; and second, that those protected uses must not be irreconcilable with the nature of the group's attachment to that land.

*Lamer CJ*<sup>90</sup>

Before delving into the examination of the nature of Aboriginal title, it is pertinent to state that there is a divergence of scholarly views on the propriety or otherwise of the concept. While some scholars acknowledge the legal concept, other scholars contend that it is a common law concept and therefore incompatible with indigenous legal traditions.<sup>91</sup> That said, this section explores the nature of Aboriginal title as has been developed by the Supreme Court of Canada without getting into the arguments of the suitability of the concept.

Aboriginal title is a *sui generis* interest in land which can only be held communally by Aboriginal nations.<sup>92</sup> Lamer CJ expressly identifies the three facets of Aboriginal title that makes it *sui generis* as follows: *its inalienability, source, and communal nature*.<sup>93</sup> First, lands held under Aboriginal title are inalienable to third parties in the sense that they cannot be sold, surrendered or transferred to any person other than the Crown.<sup>94</sup> Further, the source of Aboriginal title makes it unique. It arises as a result of the prior occupation of land before the assertion of British sovereignty as

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<sup>90</sup> *Delgamuukw*, *supra* note 2 at para 117.

<sup>91</sup> For criticism of the doctrine of Aboriginal title, see John Borrows, *Sovereignty's Alchemy: An Analysis of Delgamuukw v. British Columbia*, (1999) 37 Osgoode Hall L. J. 537 at 562-563. John Borrows argues that "Sovereignty's incantation is like magic. Its mantra is 'Aboriginal title is a burden on the Crown's underlying title.' This mere assertion is said to displace previous Indigenous titles by making them subject to and a burden on, another's higher legal claims...Is the mere assertion of sovereignty an acceptable justification for the Crown's displacement of Indigenous titles? It does not make sense that one could secure a legal entitlement to land over another merely through raw assertion...It is even less of a 'morally and politically defensible' position when this assertion has not been a neutral and noble statement, but has benefited the Crown to the detriment of the land's original inhabitants. As such, 'it does not make sense' to speak of Aboriginal title as being a 'burden' on the Crown's underlying title. As "it does not make sense to speak of a burden on the underlying title before the title existed..." See also John Borrows, "The Durability of Terra Nullius: *Tsilhqot'in Nation v British Columbia*" (2015) 48:3 UBC L Rev. 701 at 725.

<sup>92</sup> *Delgamuukw*, *supra* note 2 at para 115.

<sup>93</sup> *Ibid* at para 113-115. See also Thomas Isaac, *Aboriginal Title* (Saskatoon: Native Law Centre, 2006) at 12.

<sup>94</sup> *Ibid* at para 113.

opposed to normal fee simple estates which arise afterward.<sup>95</sup> Finally, Aboriginal title is communal because it can only be held collectively by Aboriginal nations and not individually by Aboriginal persons.<sup>96</sup>

Therefore, an Aboriginal title is based on the prior occupation of land before colonization.<sup>97</sup> In order to establish Aboriginal title, such occupation must be “*sufficient*; it must be *continuous* (where present occupation is relied on), and it must be *exclusive*.”<sup>98</sup>

An examination of *Delgamuukw* shows that Aboriginal title can be divided into two components: *economic and non-economic components*. The economic component reflects the tangible dimension of Aboriginal title and extends to the uses in which an Aboriginal title can be put to.<sup>99</sup> On the other hand, the non-economic component shows the intangible spiritual and cultural aspect of Aboriginal title, exhibited by an Aboriginal group’s unique connection and relationship with their land.<sup>100</sup>

From the discussion so far, Aboriginal title is different from other types of interest in land like fee simple estate. If that is the case, the next thing would be to decipher the rights that Aboriginal title confers that makes it different. The Supreme Court of Canada (SCC) per McLachlin C.J. held as follows:

Aboriginal title confers ownership rights similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land.<sup>101</sup>

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<sup>95</sup> *Ibid* at para 114.

<sup>96</sup> *Ibid* at para 115.

<sup>97</sup> *Tsilhqot’in Nation*, *supra* note 6 at para 25.

<sup>98</sup> *Ibid* at 25.

<sup>99</sup> *Delgamuukw*, *supra* note 2 at para 166.

<sup>100</sup> *Ibid* at para 129.

<sup>101</sup> *Tsilhqot’in Nation*, *supra* note 6 at para 73.



The SCC likened Aboriginal title to fee simple for the purpose of explaining the rights it confers. It is pertinent to state that the SCC has made it clear that Aboriginal title is not to be equated with fee simple or other traditional property law concepts.<sup>102</sup> However, inferences from those property law concepts may be used to explain the concept of Aboriginal title.<sup>103</sup> That said, the above rights that McLachlin C.J. outlined as the rights Aboriginal title confers arguably relate to the economic component of Aboriginal title and not the non-economic component. The first basis for this view is that the rights outlined are the exact rights tenable in fee simple, and fee simple does not contemplate non-economic component of Aboriginal title. Secondly, those rights are quite tangible and do not allude to the intangible aspect of Aboriginal title. Hence, simply put, the rights outlined by McLachlin C.J. are not the only sets of rights that Aboriginal title confers; they are rights that the economic aspects of Aboriginal title confer. McLachlin C.J. held that “Aboriginal title confers ownership rights similar to that of a fee simple.” Perhaps, it could have been different if she held that “the only sets of rights Aboriginal title confers are the rights similar to that of a fee simple.”

The rights set out by McLachlin C.J. come with some restrictions which are predicated on the non-economic component of Aboriginal title. The restrictions include:

1. It can only be held communally, not only for the present generation but also for all succeeding generations.<sup>104</sup>
2. It is inalienable except to the Crown<sup>105</sup>
3. It cannot be developed, used or misused in a way that would prevent the future generation from using and it.<sup>106</sup>

The above restrictions are predicated on the relationship and connection Aboriginal peoples have with their land (non-economic component).<sup>107</sup> It is by virtue of the relationship indigenous peoples have with their land that it cannot be alienated to a third party other than the Crown and it cannot be used in a manner that will preclude a future generation from enjoying that relationship and

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<sup>102</sup> *Ibid* at para 72. See also *Delgamuukw*, *supra* note 2 at para 190.

<sup>103</sup> *Ibid* at para 72.

<sup>104</sup> *Ibid* at para 74.

<sup>105</sup> *Ibid* at para 74.

<sup>106</sup> *Ibid* at para 74.

<sup>107</sup> *Delgamuukw*, *supra* note 2 at para 128-129.

connection with the land.<sup>108</sup> This shows that the intangible aspect of Aboriginal title is in itself a right and also security to the continued existence of other rights that Aboriginal title confers as outlined by McLachlin C.J. for the future generation. The rights conferred by the intangible component of Aboriginal title have not been outlined by the SCC, probably because they vary according to the particular nature of Aboriginal title.

The inherent limit of Aboriginal title was indicated differently in *Delgamuukw*. Lamer C.J. held that “lands subject to [A]boriginal title cannot be put to such uses as may be irreconcilable with the nature of the occupation of that land and the relationship that the particular group has had with the land...”<sup>109</sup> He gave two illustrations:

“...if occupation is established with reference to the use of the land as a hunting ground, then the group that successfully claims [A]boriginal title to that land may not use it in such a fashion as to destroy its value for such a use (e.g., by strip mining it). Similarly, if a group claims a special bond with the land because of its ceremonial or cultural significance, it may not use the land in such a way as to destroy that relationship (e.g., by developing it in such a way that the bond is destroyed, perhaps by turning it into a parking lot).”<sup>110</sup>

Dwight Newman argues the applicability of this restriction may be uncertain even before the decision of the SCC in *Tsilhqot'in Nation*.<sup>111</sup> He further contends that *Tsilhqot'in Nation* may have made the situation even less clear as there is uncertainty as regards whether the inherent limit on Aboriginal title continues to apply.<sup>112</sup> This argument is based on the variety of approaches the SCC used in representing the limits of Aboriginal title in the two decisions.<sup>113</sup> Thus, *Delgamuukw* and

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<sup>108</sup> *Tsilhqot'in Nation*, *supra* note 6 at para 74.

<sup>109</sup> *Ibid* at para 128.

<sup>110</sup> *Ibid* at para 128. The procedure to be adopted by the doctrine of the duty to consult does not necessarily address the issue of remedies for infringement of Aboriginal title.

<sup>111</sup> Newman, *supra* note 8 at 12. Dwight Newman is a Professor of Law and Canada Research Chair in Indigenous Rights in Constitutional and International Law at the University of Saskatchewan, Canada. In this particular piece he examines top ten uncertainties of Aboriginal title three years after the SCC decision in *Tsilhqot'in Nation*. One of the uncertainties outlined by the legal jurist (although ranking the least in his order) is the “applicability of the cultural limit on the use of Aboriginal title lands”.

<sup>112</sup> *Ibid* at 12.

<sup>113</sup> *Ibid* at 12.

*Tsilhqot'in Nation*, with respect to the inherent limit of Aboriginal title may be said to be ambiguous.<sup>114</sup> This is because it is uncertain whether *Tsilhqot'in Nation* replaces *Delgamuukw* in that aspect or not.<sup>115</sup>

A contrary argument would be that although there may be uncertainty as regards the scope of the inherent limit of Aboriginal title, there is no ambiguity between *Delgamuukw* and *Tsilhqot'in Nation* in that respect. The uncertainty persists because *Tsilhqot'in Nation* did not make clear the uncertain illustrations given in *Delgamuukw* to show the scope of the inherent limit of Aboriginal title. However, there appears to be no ambiguity as regards whether or not the inherent limit still applies. *Tsilhqot'in Nation* reproduces the inherent limits in *Delgamuukw* in another language, but they are invariably the same thing. In *Tsilhqot'in Nation*, it was held that the land cannot “be developed or misused in a way that would substantially deprive future generations of the benefit of the land.”<sup>116</sup> The choice of language of McLachlin C.J. for indication of the inherent limit of Aboriginal title may not have been the best, but the restriction on use or misuse that will deprive future generation of the “benefit to the land” in that decision implies cultural, economic and non-economic benefits that give the Aboriginal title its nature. What remains uncertain is the scope of this limitation. Perhaps, this was deliberately left uncertain in *Tsilhqot'in Nation*, so that it will be decided as cases arise. This can be deduced where the SCC further held that “whether a particular use is irreconcilable with the ability of succeeding generations to benefit from the land will be a matter to be determined when the issue arises.”<sup>117</sup>

Another aspect of the restriction that is still uncertain and which directly has a nexus with the context of this thesis is the implication it has on the value of Aboriginal title. Do the restrictions of Aboriginal title as outlined in *Tsilhqot'in Nation* reduce its value? In other words, are the restrictions of Aboriginal title discounting factors where there is a need to calculate in monetary terms the value of Aboriginal title? Some arguments suggest that the restrictions are discounting factors while some literature, especially from other jurisdictions argue otherwise.<sup>118</sup> I would argue

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<sup>114</sup> *Ibid* at 12.

<sup>115</sup> *Ibid* at 12.

<sup>116</sup> *Tsilhqot'in Nation*, *supra* note 6 at para 74.

<sup>117</sup> *Ibid* at para 74.

<sup>118</sup> For this, see Isaac, *supra* note 93 at 47-48; See also the majority decision of Gonthier, Major, Binnie and LeBel JJ in *Musqueam Indian Band v. Glass*, [2000] 2 S.C.R. 633 at para 53 which tends to suggest that restrictions on

that the restrictions should not be discounting factors in the determination of the value of lands subject to Aboriginal title and consequently compensation. This point will be explored further in the later part of this thesis.

That said, in considering the nature of Aboriginal title and the right it confers, it is important to point out that the Crown has an underlying title (radical title). This underlying title was gained by the Crown at the assertion of British sovereignty.<sup>119</sup> It is pursuant to this underlying title that Aboriginal title can only be surrendered to the Crown. By virtue of the underlying title also, the Crown can also justifiably dispossess or deprive (wholly or partly) an Aboriginal group their land rights and interest in a land that is held under Aboriginal title. For this to be valid, it must be justifiable. To justify an infringement of the rights and interests of an Aboriginal group in land held under an Aboriginal title, the following test must be met:

1. The Crown must show that it has discharged its procedural duty to consult and accommodate.<sup>120</sup>
2. The action of the Crown must be backed by a compelling and substantial objective.<sup>121</sup>
3. The governmental action is consistent with the Crown's fiduciary obligation to the group.<sup>122</sup>

The Crown's fiduciary obligation is a broader discussion that will be explored in Chapter two especially as it relates to compensation. Based on the nature of Aboriginal title and the radical title of the Crown, the relationship between the Crown and Aboriginal peoples is that of a fiduciary.<sup>123</sup> That said, the fiduciary obligation of the Crown encompasses a lot of factors including the obligation to give redress to an indigenous group whose interest in land which is held pursuant to Aboriginal title is deprived or dispossessed. The SCC recognized this in *Delgamuukw* where it

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indigenous land rights are discounting factors to their value. See also Anuar Alias & Md Nasir Daud, *Saka: Adequate Compensation for Orang Asli Native Land* (Johor: Pejabat Penerbit) at 99 where the jurists argued that inalienability of the native title in Malaysia should not be a discounting factor to its value.

<sup>119</sup> *Delgamuukw*, *supra* note 2 at para 145.

<sup>120</sup> *Tsilhqot'in Nation*, *supra* note 6 at para 77.

<sup>121</sup> *Ibid* at para 77.

<sup>122</sup> *Ibid* at para 77.

<sup>123</sup> *Guerin v. The Queen* [1984] 2 R.C.S. 335 at 349. See also *R. v. Sparrow* [1990] 1 SCR 1075 at 1108.

was held that for the Crown to fulfill its fiduciary obligation, fair compensation will ordinarily be required where an Aboriginal title is infringed.<sup>124</sup>

#### **1.4 Non-Economic Component of Aboriginal Title**

Indigenous peoples in different societies have explained that the relationship they have with their land forms the core of their existence.<sup>125</sup> United Nations Special Rapporteur José Martínez Cobo reflects on this point in his study of the problem of discrimination against indigenous populations.<sup>126</sup> He submits that:

It is essential to know and understand the deeply spiritual relationship between indigenous peoples and their land as basic to their existence as such and to all their beliefs, customs, traditions and culture. For such peoples, the land is not merely a possession and a means of production. The entire relationship between the spiritual life of indigenous peoples and the Mother Earth, and their land, has a great many deep implications. Their land is not a commodity which can be acquired, but a material element to be enjoyed freely.<sup>127</sup>

Different international law instruments recognize the need for the respect of the deep spiritual and cultural connection indigenous peoples have with their lands as it is basic to their essence.<sup>128</sup> This deep spiritual and cultural connection appears to be intangible and may not readily have a monetary value as it is equated with the very essence of indigenous peoples.

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<sup>124</sup> *Delgamuukw*, *supra* note 2 at para 169.

<sup>125</sup> Erica-Irene A. Daes, *Indigenous Peoples and their Relationship with Land*, UNCHR, 53<sup>rd</sup> Session, UN Doc E/CN.4/Sub.2/2001/21, (2001) at para 13. See also Brenda L. Gunn, “More than Money: Using International Law of Reparations to Determine Fair Compensation for Infringements of Aboriginal title (2013) 46:2 UBC L Rev. at 299.

<sup>126</sup> José Martínez Cobo, *Study of the Problem of Discrimination against Indigenous Populations: Chapter XXI-XXII Conclusions, Proposals and Recommendations*, UN Doc E/CN. 4. Sub 2/1983/21/Add.8 (1983) at paras 196-97.

<sup>127</sup> *Ibid* at paras 196-97. See also Gunn, *supra* note 125 at 299.

<sup>128</sup> See *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*, 13 September 2007, A/RES/61/295 Art 25; *International Labour Organization (ILO) Convention concerning Indigenous and Tribal Peoples*, 27 June 1989, C169 (entered into force 5 September 1991) at Art. 13.

In a Canadian context, the importance of the deep spiritual connection of Aboriginal peoples and their lands is well captured in Gisday Wa and Delgam Uukw's *Spirit in the Land*.<sup>129</sup> The book contains the statements of the Hereditary Chiefs of the Gitksan and Wet'suet'en people in the Supreme Court of British Columbia, 1887-1990. The Chiefs together governed 22, 000 square miles of Gitksan and Wet'suet'en territories located in the province of British Columbia.<sup>130</sup> Delgam Uukw, a Giksan Chief stated that:

For us, the ownership of territory is a marriage of Chief and the land. Each Chief has an ancestor who encountered and acknowledged the life of the land. From such encounters come power. The land, the plants, the animals and people all have spirit- they all must be shown respect. That is the basis of our law. The Chief is responsible for ensuring that all the people in his House respect the spirit in the land and in all living things.<sup>131</sup>

From the statement of Chief Delgam Uukw, the land and everything that is on it possess a spirit. The spirit also gives the land life. Although the spirit in the land may not be visible to the eyes and intangible to be touched, its existence and essence are real to Aboriginal peoples. It is pertinent to note that the discussion in that book represents one particular indigenous context. Although different indigenous communities may have similarities in their spiritual connection to land, it is important not to homogenize all indigenous cultures.

Some Aboriginal groups may hold the view that except for restitution of the land itself, it might be impossible to accommodate or remedy the loss of their spiritual connection to land upon infringements of their land rights. This may be because of the complexity of valuation of the said spiritual connection and the difficulty in determining what may be used to replace or recompense the deprivation or violation of the relationship with the land. For instance, in *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*<sup>132</sup> the government of British

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<sup>129</sup> Gisday Wa and Delgam Uukw, *The Spirit in the Land: Statements of the Gitksan and Wet'suet'en Hereditary Chiefs in the Supreme Court of British Columbia 1887-1990* (British Columbia: Reflections, 1992). See also Antonia Mills, *Eagle Down is Our Law: Witsuwit'en Law, Feasts, and Land Claims* (Vancouver: UBC Press, 1994).

<sup>130</sup> *Ibid* at 7.

<sup>131</sup> *Ibid* at 7.

<sup>132</sup> *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)* [2017] SCC 54.

Columbia approved a ski resort in spite of the claim by First Nation that development would breach religious rights.<sup>133</sup> The place the ski resort was sought to be built is Qat'muk, a place of religious significance.<sup>134</sup> There was a consultation of the Ktunaxa, but at a point, they were of the view that accommodation was impossible because the project would drive Grizzly Bear Spirit from Qat'muk and therefore irrevocably impair their religious beliefs and practices.<sup>135</sup>

The contention by the First Nation in *Ktunaxa Nation* appears to give credence to the statement of Chief Delgam Uukw. Thus, for many Aboriginal peoples in Canada, their lands go beyond the tangible economic benefits that come as a result of the use and occupation of the lands. There exists another element which may even be more important than the economic dimension as it defines their essence. That dimension is intangible and non-economic but has value to Aboriginal peoples that may be complex to determine or difficult to compensate with money at all.

In *Delgamuukw*, although the SCC recognized the non-economic dimension of Aboriginal title as an important and unique component, it was held that such “inherent value of that land should not be taken to detract from the possibility of surrender to the Crown in exchange for valuable consideration.”<sup>136</sup> The question of the possible figure that may be a valuable consideration for the non-economic component of Aboriginal title remains uncertain as the SCC is yet to address it.

### **1.5 Choice and Quantum of Remedies for Infringement of Aboriginal Title**

The possible remedies for infringements of the broader land rights and interests of indigenous peoples are set out in the *United Nations Declaration on the Rights of Indigenous People (UNDRIP)*.<sup>137</sup> Remedies may take the form of restitution of land, reallocation of lands, territories or resources; equal in size and quality with the deprived land right or monetary compensation.<sup>138</sup> Infringements of Aboriginal title in Canada may take different forms; examples include expropriation and grants of tenures by the Crown that are inconsistent with continuing Aboriginal interests. Such tenures might be in the form of a fee simple grant to a third party, a grant of a lease,

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<sup>133</sup> *Ibid* at paras 1-10.

<sup>134</sup> *Ibid* at paras 1-10.

<sup>135</sup> *Ibid* at paras 1-10.

<sup>136</sup> *Delgamuukw*, *supra* note 2 at paras 129 & 131.

<sup>137</sup> *UNDRIP*, *supra* note 129 at Art 28.

<sup>138</sup> *Ibid* at Art 28.

license or permit. Also, the act of the government that adversely impact Aboriginal title may be justifiable or not. There appears to be no guideline for redress for the infringement of Aboriginal title, especially for retrospective infringements. The doctrine of the duty to consult as was expounded in *Haida Nation* appears to give a guideline as regards the procedure to be adopted for future infringements.<sup>139</sup> This doctrine is to the effect that the Crown has the duty to consult an Aboriginal community where it has knowledge (real or constructive) of the potential existence of Aboriginal right or title and contemplates conduct that adversely affects it.<sup>140</sup> The duty upon the Crown becomes stricter where the title has been established.<sup>141</sup> Notwithstanding this doctrine, the form and quantum of remedies available to an Aboriginal community where the Crown fails to meet the duty to consult are uncertain. For instance, it was held in *Tsilhqot'in Nation* that “if the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing.”<sup>142</sup> The fact that the Crown “may be required to cancel the project,” where the duty to consult has not been met implies that the Crown “may also not be required to cancel” depending on the facts and circumstances of the case. The court did not go further to highlight the appropriate remedies that the affected Aboriginal community will be entitled to.<sup>143</sup> Thus, the uncertainty in Canada extends to the choice of remedies.

Some scholars suggest that it might be better for the courts to attempt to devise practical remedies that would take into contemplation of the need to also protect third party rights.<sup>144</sup> Such means may be a better fulfillment of the underlying purpose of Section 35 of the *Constitution Act, 1982* which is “the reconciliation of the pre-existence of [A]boriginal societies with the sovereignty of the Crown.”<sup>145</sup> Some jurists further suggest that in practical terms, the most appropriate remedy for the infringement of Aboriginal title in Canada is compensation.<sup>146</sup> This is because

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<sup>139</sup> *Haida Nations*, *supra* note 34 at para 35.

<sup>140</sup> *Ibid* at para 35.

<sup>141</sup> *Tsilhqot'in Nation*, *supra* note 6 at para 80. Upon establishment of Aboriginal title, the duty on the Crown appears to be to obtain “consent” and not just to “consult”.

<sup>142</sup> *Ibid* para 92 (Emphasis Added).

<sup>143</sup> Newman, *supra* note 8 at 15.

<sup>144</sup> *Ibid* at 15. See also Malcolm Lavoie, Aboriginal Title Claims to Private Land and the Legal Relevance of Distributive Effects” in Dwight Newman, ed, *Business Implications of Aboriginal Law* (Toronto: LexisNexis, 2018) at 133; Isaac, *supra* note 93 at 47.

<sup>145</sup> *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para 31.

<sup>146</sup> Isaac, *supra* note 93 at 47.



compensation may be better suited for balancing of interests of an Aboriginal group and third parties who may have come upon the land as bona fide purchasers for value without notice. While making a case for compensation, Isaac argues as follows:

When dealing with the transfer of private rights on Crown land, an entitlement to injunctive relief will be difficult to establish... Moreover, remedies grounded in trust and fiduciary will only be available in rare circumstances, if at all. Accordingly, notwithstanding certain decisions, it appears that compensation will continue to be the appropriate remedy for infringements of proven Aboriginal title on the Crown land in most circumstances.<sup>147</sup>

Furthermore, several paragraphs of *Delgamuukw* shows that infringements of Aboriginal title are compensable and this gives the suggestion that compensation is the appropriate choice of remedy for infringements of Aboriginal title.<sup>148</sup>

Malcolm Lavoie contends in support of the above view that the clearest way to vindicate Aboriginal title claims while protecting third-party interests in the same land is through monetary compensation.<sup>149</sup> He argues that monetary compensation should not be seen as overriding Aboriginal interest with private third-party interest, rather it is a better way to ensure legal order.<sup>150</sup> His argument is with respect to Aboriginal claims of privately owned lands in Canada. These private interests arose as a result of government grants of fee simple interests that are inconsistent with Aboriginal title.<sup>151</sup> In his view, remedies that fundamentally undermine existing rights have a strong tendency to disrupt the existing legal order.<sup>152</sup> Since the Crown is responsible for the wrong by granting tenures that are inconsistent with Aboriginal title to innocent third parties, it should be liable to redress the Aboriginal group affected through the award of damages for breach of fiduciary duty or wrongful appropriation of land.<sup>153</sup>

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<sup>147</sup> *Ibid* at 47.

<sup>148</sup> *Delgamuukw*, *supra* note 2 at paras 203, 169, 166, 145.

<sup>149</sup> Lavoie, *supra* note 144 at 133.

<sup>150</sup> *Ibid* at 134.

<sup>151</sup> *Ibid* at 136.

<sup>152</sup> *Ibid* at 154.

<sup>153</sup> *Ibid* at 155.

That said, this thesis does not extend to discussions on other forms of remedies like restitution of lands, reallocation of similar lands, injunctions, etc. This is because the scope of this work is limited to compensation. This, of course, does not mean other forms of remedies are not viable remedies. They may be in appropriate circumstances. For instance, Richtersveld Community in South Africa succeeded in a claim of restitution of land against the government.<sup>154</sup> Unlike the situation in Canada, there is an enabling statute for restitution of land in South Africa.<sup>155</sup> Also, *UNDRIP* recognizes these remedies as viable remedies. However, if compensation is arguably the most practical remedy upon the infringement of Aboriginal title, then there is a crucial need to explore the subject in order to determine the appropriate legal principles that should inform a fair and adequate compensation that will recompense the loss of an affected Aboriginal community.

The quantum of compensation should ordinarily reflect the rights infringed. Having explored the nature of Aboriginal title and the rights it confers, the measure of compensation for the infringement of Aboriginal title should ordinarily reflect both the economic and non-economic components of Aboriginal title. *Delgamuukw* which emphasized that infringements of Aboriginal title are compensable did not go further to explain the appropriate legal principles that will be adopted for the determination of compensation.

Hence, this thesis explores the appropriate legal principles that should be used for the determination of compensation upon the infringement of Aboriginal title.

## **1.6 Methodology and Structure**

The methodology this research employs is doctrinal. It involves a legal survey of the legal principles that inform the valuation of compensation for the infringement of the rights and interest in lands that are subject to Aboriginal title in Canada from different varying sources. Further, the

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<sup>154</sup> *Alexkor Ltd. and Another v. Richtersveld Community and Others* 2003 (12) BCLR 1301 (CC) (South African Constitutional Court).

<sup>155</sup> The Richtersveld Community relied on section 2 of the *Restitution of Land Rights Act* 22 1994 which provides that “A person shall be entitled to restitution of a right in land if ... (d) it is a community or part of a community dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; and (e) the claim for such restitution is lodged not later than 31 December 1998.”

research extends to the analysis of the legal trends and practices in Australia, Malaysia and the international arena as regards valuation of compensation for infringement of the land rights of indigenous peoples. The experiences of those jurisdictions are compared with that of Canada. Some of the principles deduced from these jurisdictions form part of the proposals made at the concluding chapter for the development of the compensation regime concerning the infringement of Aboriginal title lands. This part gives a summary of the structure of the research. A detailed analysis of the summary made below will be found in the main body of the thesis.

The next chapter examines extant principles of compensation for the infringement of Aboriginal title lands in Canada. These principles are deducible from several sources that are saying different things. The situation makes the regime susceptible to variabilities and same perpetuates uncertainty. Some of the sources that are examined in that chapter are binding while others are appraised for the purpose of deducing principles that may be persuasive to the courts in the determination of compensation. The appraisal begins with the *Royal Proclamation of 1763* which has been held by the SCC to contemplate fair compensation for an Aboriginal group that surrenders their interest in their land.<sup>156</sup> This legal document however does not provide for a mechanism for the determination of fair compensation. Further, the chapter examines relevant provisions of the *Indian Act*<sup>157</sup> on the determination of compensation upon surrender or expropriation of an Indian band's rights and interests in their reserve.<sup>158</sup> This Act gave a strong legal basis for the decision of the SCC in *Guerin v. The Queen* which is to the effect that the mechanism for the determination of compensation for the infringement of Indian reserves should employ the fiduciary principles for determination of compensation where a fiduciary breaches his duties.<sup>159</sup> The discussion in that chapter extends to the four variabilities noted by the SCC in *Delgamuukw* that may affect the amount of compensation.<sup>160</sup>

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<sup>156</sup> *Delgamuukw*, *supra* note 2 at paras 203.

<sup>157</sup> *Indian Act*, RSC 1985.

<sup>158</sup> *Ibid* at ss 18 & 35. See also *Guerin v. The Queen* [1984] 2 R.C.S. 335.

<sup>159</sup> *Guerin*, *supra* note 123 at 357.

<sup>160</sup> *Delgamuukw*, *supra* note 2 at paras 169. These variabilities include the nature of Aboriginal title, the nature of infringement, degree of infringement and extent to which Aboriginal interest is accommodated. The SCC did not explain the possible implications of these variabilities. This research analyses the possible implications these variabilities might have on compensation for the infringement of Aboriginal title.

The modalities employed for cases of infringement of indigenous land rights in modern treaties are also examined. The principles in some modern treaties may be persuasive to the courts in the broader context of the determination of compensation for infringement of Aboriginal title. Further, that chapter examines the relevant provisions of the *Specific Claims Tribunal Act (SCTA)*.<sup>161</sup> The *SCTA* establishes the Specific Claims Tribunal (SCT) to decide cases of “validity and compensation” concerning the specific claims of First Nations identified in the legislation.<sup>162</sup> The Act only affects the rights of a First Nation where the First Nation chooses to file a claim in the Tribunal.<sup>163</sup> The last sections of the chapter examine the *Expropriation Act*, the *First Nation Land Management Act (FNLMA)*<sup>164</sup> and the *Métis Settlement Act (MSA)*.<sup>165</sup>

It is a truism that compensation for infringement of Aboriginal title is not to be equated with the market value of a fee simple.<sup>166</sup> Thus, the principles for the determination of compensation as enshrined in the *Expropriation Act* are not applicable where Aboriginal title lands are the subject of infringement. However, the principles in the *Expropriation Act* may be appropriate persuasive principles where they are adapted to suit the peculiarities of Aboriginal title.<sup>167</sup> Also, the application of *FNLMA* and *MSA* are restricted to lands specified in the Acts. However, the compensation mechanism in those Acts is worthy of exploration to draw persuasive principles which may be relevant for a broader application.

Chapter three is dedicated to the appraisal of the experiences in Australia, Malaysia and under the *UNDRIP*. Canada is not the only country that contends with issues relating to compensation for the infringement of indigenous land rights.<sup>168</sup> Unlike Canada, Australia has a comprehensive, mandatory statutory regime; the *Native Title Act (NTA)*<sup>169</sup> for native claims and the determination

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<sup>161</sup> *Specific Claims Tribunal Act, (SCTA)* S.C. 2008, c. 22.

<sup>162</sup> *Kitselas First Nation v. Her Majesty the Queen in Right of Canada*, 2013 SCTC 1 at para 26. See also *SCTA*, *supra* note 150 at s 3.

<sup>163</sup> *SCTA*, *supra* note 161 at s 5.

<sup>164</sup> *First Nation Land Management Act* S.C. 1999, c. 24. The Act ratified the *Framework Agreement on First Nation Land Management* between the Crown and a specified group of First Nations in relation to their land.

<sup>165</sup> *Métis Settlement Act*, RSA 2000, c M-14 (*MSA*). The primary purpose of the Act is to enhance Métis identity, culture, and self-governance by creating a land base for Métis in Alberta, Canada.

<sup>166</sup> For this see *Delgamuukw*, *supra* note 2 at paras 203.

<sup>167</sup> Chapter two suggests ways in which the principles in the *Expropriation Act* could be interpreted to suit Aboriginal title.

<sup>168</sup> *Adkins et al*, *supra* note 10 at 371.

<sup>169</sup> *Native Title Act 1993 (Cth) (NTA)*.

of compensation for infringement of their native title.<sup>170</sup> This thesis draws from some of the principles enshrined in the *NTA* as has been explored in some of the cases by Australian Courts.<sup>171</sup> The research also extends to the mechanisms for determination of compensation for infringement of native title in Malaysia. The choice of Australia and Malaysia is primarily based on the similarities between the nature of indigenous land rights and interests in those states with Aboriginal title in Canada.<sup>172</sup> Hence, the purpose of the comparison is to draw lessons from their experiences and make proposals to both policymakers and the courts for implementation in Canada.

Other jurisdictions may have the indigenous land rights similar to that of Canada, however I restricted my comparison to Australia and Malaysia.<sup>173</sup> The principles developed so far in those jurisdictions and the existing literature there helped to deal with some conceptual issues raised by this thesis. The proposals made in this research to both policymakers and the courts for the development of the existing legal regime on compensation for infringements of Aboriginal title are drawn from these jurisdictions.

Furthermore, the relevant provisions of *UNDRIP* are examined. This is motivated by the ongoing debate on the propriety or otherwise of the full implementation of *UNDRIP* in Canada. The examination answers the question; whether the full implementation of *UNDRIP* will fill the gap in the compensation regime for infringement of Aboriginal title in Canada?

Finally, the last chapter brings in original and innovative proposals that may be potential solutions to the issues raised by the measurement of compensation for infringements of Aboriginal title in Canada. That chapter advocates for a legislative framework that will set out the principles for the

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<sup>170</sup> Adkins *et al*, *supra* note 10 at 372.

<sup>171</sup> *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900 at para 197; *Northern Territory of Australia v Griffiths* [2017] FCAFC 106.

<sup>172</sup> The examination of the nature of native title in Australia and Malaysia shows similarities between their native land rights and Aboriginal title in Canada.

<sup>173</sup> The preliminary research before the decision to restrict the comparison to Australia and Malaysia explored other jurisdictions like New Zealand, the United States of America, South Africa, Kenya and Nigeria. I found the framework in Australia and Malaysia more helpful as some of the principles applied in those jurisdiction answers some of the complex questions about determination of compensation in the context of my contentions more than other jurisdictions.

determination of compensation for infringement of Aboriginal title. Further, it proposes principles that should be the content of such legislation.

Apart from the proposal for legislative action, some of the mechanisms set out in that chapter portray principles that may be persuasive authorities to the courts in the determination of compensation. The core of the principles proposed in that chapter is the adoption of a *bifurcated approach* of calculation of compensation. This mechanism for calculation of compensation is drawn from the approach adopted by the Federal Court of Australia in *Griffiths* while applying the provisions of *NTA*. It entails the separate calculation of the economic and non-economic losses that may be occasioned by the infringement of Aboriginal title. I argue that the adoption of this approach separates the incalculable component of the value of Aboriginal title from the calculable component. The danger of a holistic measurement of the value of the infringed rights and interests in land subject to Aboriginal title is that the rights and interest become wholly incalculable. This shall be explored further in that chapter.

## CHAPTER TWO: CRITICAL ANALYSIS OF THE PRINCIPLES FOR THE DETERMINATION OF COMPENSATION FOR INFRINGEMENT OF ABORIGINAL TITLE IN CANADA.

### 2.1 Introduction

The previous chapter shows that infringements of Aboriginal title are compensable. This implies that compensation may be important to questions of justification of infringement of Aboriginal title.<sup>174</sup> Equally, in cases of unjustified infringements, compensation may be an appropriate remedy to recompense for the wrong done to an Aboriginal group whose interest in land has been infringed. The appropriateness of compensation either as an element for justifying an infringement or as a remedy for unjustified infringement is highly dependent on the principles relied upon for determination of same. The actions of the Crown that may constitute an infringement vary. However, it may come in the form of expropriation and grants of tenures by the Crown that is inconsistent with continuing Aboriginal interests. Such tenures might be in the form of a fee simple grant to a third party, a grant of a lease, license or permit.

It has long been held by the Supreme Court of Canada (SCC) that as far as the relationship between the Crown and Aboriginal peoples is concerned, the principle that should be used to measure and regulate the action, decision, omission, and conduct of the government with respect to the rights of Aboriginal peoples is the honour of the Crown.<sup>175</sup> Accordingly, the target for fair compensation upon an infringement of Aboriginal title is to meet the honour of the Crown.<sup>176</sup> This broad measurement is uncertain and may mean many things in different circumstances. Hence, the real complication is to decipher the principles to be relied upon in order for compensation to fulfill the underlying aims of remedies in practical circumstances where an Aboriginal title land is infringed.

Canada has not developed a legislative scheme that formally addresses the issue of compensation, and no case law has formally examined the principle for determination of compensation with

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<sup>174</sup> *Delgamuukw*, *supra* note 2 at para 169.

<sup>175</sup> J. Timothy S. McCabe, *The Honour of the Crown and its Fiduciary Duties to Aboriginal Peoples* (Ontario: LexisNexis, 2008) at 53.

<sup>176</sup> Kindly see the introductory section of chapter one of this work where the honour of the crown is briefly explored as the standard of compensation for infringement of Aboriginal title.

respect to Aboriginal title. However, it will be wrong to say that Canada is totally bereft of such principles. These principles may be deduced from different legislative instruments and case laws. The adequacy of these principles is entirely a different question altogether which will ultimately be addressed in a later part of this thesis.

Further to the above, the discussion in this chapter focuses on the doctrinal analysis of the existing principles for the determination of compensation where Aboriginal title is infringed. These principles can be deduced from several sources in Canada. Such sources include the *Royal Proclamation of 1763*, *Indian Act*, *Expropriation Act*, case laws, modern treaties and other legislative instruments. Some of the sources discussed in this chapter are not binding on cases of infringement of Aboriginal title, but they may be persuasive to the courts while determining compensation for infringement of Aboriginal title.

This chapter finds that the focal point for the determination of compensation is the fiduciary obligation owed to Aboriginal peoples by the Crown. The attempt has been to balance the interest of Aboriginal peoples with that of the Crown and other societal perspectives. However, in practical terms, the challenge has been to find that balance. Thus, as the compensation principles that can be gleaned from these sources are examined, insight is also given on how to attain the desired balance the sources tend to address.

## **2.2 Royal Proclamation of 1763**

The *Royal Proclamation of 1763* (the *Proclamation*) which was issued by King George III of Great Britain was the Crown's formal attempt to recognize Indian interest in their land.<sup>177</sup> It has initially been thought that the source of Aboriginal title was the *Proclamation*.<sup>178</sup> However, it is now settled that the document affirms the existence of Aboriginal title, but it does not create it.<sup>179</sup> Aboriginal title exists independently of the *Proclamation* as it arises from the occupation of land by Aboriginal peoples before the establishment of European sovereignty in Canada.<sup>180</sup> What did the *Proclamation* do? Although it has been established that the *Proclamation* is not the source of

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<sup>177</sup> Isaac, *Aboriginal Title*, *supra* note 93 at 4.

<sup>178</sup> *St. Catherine's Milling and Lumber Company v. The Queen* (1888), 30 U.S. (5 Pet) 1.

<sup>179</sup> *Ibid* at 5. See also *Delgamuukw*, *supra*, note 2 at para 114.

<sup>180</sup> *Delgamuukw*, *supra* note 2 at para 114.



Aboriginal title, its implication on the Aboriginal peoples has received diverse comments over the years.

Some scholars contend that the *Proclamation* gives the Aboriginal peoples a right to self-government.<sup>181</sup> On the other hand, other scholars argue that while the *Proclamation* gives Aboriginal peoples some inherent rights, there is no such basis in the document for their self-government.<sup>182</sup> The latter view appears to be the position of the SCC in *R. v. Sparrow*<sup>183</sup> where it was held that the *Proclamation* bears witness that the sovereignty, legislative power and underlying title to lands is vested in the Crown.<sup>184</sup> Thus, the *Proclamation* may be said not to *strictly* recognize Aboriginal title as it was before the Crown's assertion of sovereignty. This is because notwithstanding that it stands as protection for Aboriginal title, the Crown still has an underlying title.

The underlying title of the Crown does not negate customary native systems of land use; however, it comes with some restrictions as Aboriginal peoples cannot cede their territory to any other state or person (s) other than the Crown.<sup>185</sup> The underlying title of the Crown extends to the right of the Crown to acquire lands by purchase or in appropriate circumstances by justified infringements. If the Crown acquires Aboriginal title lands, the protection given by the *Proclamation* ordinarily entitles the Aboriginal group affected to just compensation.<sup>186</sup> The excerpt of the *Proclamation* usually quoted as the basis of compensation upon acquisition of an Aboriginal title by the Crown is as follows:

And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having

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<sup>181</sup> John Borrows, "Constitutional Law from a First Nation Perspective: Self-Government and the Royal Proclamation" (1994) 28:1 UBC Law Review 1 at 25.

<sup>182</sup> Thomas Isaac, "Discarding the Rose-Coloured Glasses: A Commentary on Asch and MacKlem" (1992) 30:2 Alberta Law Review 708 at 711.

<sup>183</sup> *R. v. Sparrow* [1990] 1 SCR 1075.

<sup>184</sup> *Ibid.*

<sup>185</sup> Brian Slattey, "Understanding Aboriginal Rights" (1987) 66 Canadian Bar Review 727 at 742.

<sup>186</sup> *Ibid* at 752.

been ceded to or purchased by Us, are reserved to them or any of them, as their Hunting Grounds...if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony...<sup>187</sup>

The above excerpt affirms that Aboriginal title is a valuable interest in land and can be acquired by purchase.<sup>188</sup> Brian Slattery contends that the same excerpt is a strong basis for just compensation if an Aboriginal title is expropriated by the Crown where parties fail to reach a mutually agreed price for the acquisition.<sup>189</sup> Also, a critical interpretation of the excerpt may show underlying protection that may be the basis for compensation for other types of infringements of Aboriginal title that are not necessarily expropriation. It provides that Indians (Aboriginal peoples) “should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us.”<sup>190</sup> Acts of infringements like grants of leases, permits, or licenses of native lands not purchased or ceded to the Crown should ordinarily qualify as *molestation* or *disturbance*, and same under the common law also qualifies as interference that is ordinarily compensable. The *Proclamation* does not only protect Aboriginal peoples from third parties; it is also a protection from unjustifiable interference of the Crown.

In *Delgamuukw* the SCC held that the above excerpt of the *Proclamation* contemplates compensation in cases of expropriation of Aboriginal title.<sup>191</sup> If one can imply compensation for expropriation from that excerpt; one can also imply compensation for grants by the Crown that interferes with the peaceable enjoyment of Aboriginal title. Further, it is safe to conclude that the *Proclamation* is a basis for the compensation for any form of interference, action or decision of the Crown that *molests* or *disturbs* the use and enjoyment of Aboriginal title. It is pertinent to state at this juncture that the *Proclamation* is not an extinct historical document. It has been held to be

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<sup>187</sup> *Royal Proclamation 1763*. See also Slattery, *supra* note 185 at 751-752.

<sup>188</sup> Slattery, *supra* note 185 at 752.

<sup>189</sup> *Ibid* at 752.

<sup>190</sup> *Royal Proclamation 1763*.

<sup>191</sup> *Delgamuukw*, *supra* note 2 at para 203.

“an Executive order having the force of law and effect of an Act of Parliament.”<sup>192</sup> More so, it expressly recognized in section 25 of the *Canadian Charter of Rights and Freedoms*.<sup>193</sup>

That said, the missing piece appears to be the principles that should be considered in the valuation of fair compensation for interference with the use and enjoyment of Aboriginal title. One possible argument one could make is that even though the *Proclamation* protects Aboriginal title, the compensation implicit in the protection given is not necessarily an “Aboriginal land right” and thus should be governed by the principles of compensation at common law for infringements on the property by the Crown.<sup>194</sup> Therefore, the valuation of compensation should follow the principles tenable at common law for infringement of real property rights. It may not absolutely be discredited that the presumption of compensation from the *Proclamation* is a presumption rooted in common law, however, at common law also; the right to compensation is not a right that emerges on its own.

Remedies at common law are products of rights. This simply explains why the principles considered for infringement of contractual rights are different from those considered for breach of tortious rights. As the rights are different, the interests sought to be protected consequently become different, and these inform the choice and quantum of remedies. As Aboriginal title and fee simple give different kinds of rights to the holders, the factors to be considered for their compensation upon infringement should ordinarily be different even at common law. This seems to be the position of the SCC where Lamer CJ held that “...the *Proclamation* contemplated that [A]boriginal peoples would be compensated for the surrender of their lands...It must be emphasized, nonetheless, that fair compensation in the present context is not equated with the price of a fee simple. Rather, compensation must be viewed in terms of the right and in keeping with the honour of the Crown.”<sup>195</sup>

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<sup>192</sup> *Calder and others v. Attorney-General of British Columbia* [1973] S.C.R. 313 at 352. See also Isaac, *Aboriginal Title*, *supra* note 93 at 4.

<sup>193</sup> Isaac, *Aboriginal Title*, *supra* note 93 at 4. See also *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*.

<sup>194</sup> Brian Slaterry, “The Constitutional Guarantee of Aboriginal and Treaty Rights” (1982) 8 *Queen's Law Journal* 232 at 273.

<sup>195</sup> *Delgamuukw*, *supra* note 2 at 203 (Emphasis added).

Since the *Proclamation* leaves much to be presumed as regards the scope and content of its protection, the most convenient place to start in the determination of compensation for infringements pursuant to the *Proclamation* is to ascertain the interest that the document seeks to protect. The interests sought to be protected when viewed through the lens of *rights* are the *Aboriginal interests* in their territory and the *underlying interest of the Crown* to the title. On the other hand, when viewed through the lens of remedy, the interest sought to be protected could be said to be a creation of common law and not necessarily an Aboriginal right: a presumption that that for every right that is breached, there must be a remedy.

Which right is breached here? The right that is infringed is the Aboriginal interest in their land, which is not a product of common law. Since rights and remedies are intrinsically linked, the choice and quantum of remedy should reflect the particular nature of the right sought to be protected. In this particular context, the quantum of compensation should meet the honour of the Crown. In *R. v. Marshall; R. v. Bernard*<sup>196</sup> the SCC held that to uphold the honour of the Crown in consideration of issues arising from Aboriginal title, both the Aboriginal perspective and the common law perspective needs to be considered.<sup>197</sup> “Aboriginal perspective” in this context is simply the particular interest of the Aboriginal group involved which is deducible from the *particular nature of the Aboriginal title*. Accordingly, compensation for infringement of Aboriginal title should be of such value that will remedy the interest sought to be protected by the *Proclamation*. Hence, although the presumption of compensation may be said to be a creation of common law, its measure is dependent on the right protected. Therefore a synergy of Aboriginal perspective and the common law perspective may give birth to a *sui generis* principle of compensation.

Indigenous legal traditions may have principles concerning compensation which may be different from common law principles of compensation.<sup>198</sup> However, this research does not investigate

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<sup>196</sup> *R. v. Marshall; R. v. Bernard* [2005] SCC 43.

<sup>197</sup> *Ibid* at para 46.

<sup>198</sup> For instance, see Timothy L. McDaniels & William Trousdale, “Resource Compensation and Negotiation Support in an Aboriginal Context: Using Community-Based Multi-Attribute Analysis to Evaluate Non-Market Losses” Timothy L. McDaniels & William Trousdale through the use of a case study in Métis settlements in Alberta illustrate how “a multi-attribute value assessment” is the basis for characterizing the significance of resource damages that affect the settlements when viewed from the settlements’ perspectives. Their study was conducted within a series of group workshops involving a panel of community representatives. Although their research does not provide the exact

indigenous patterns of compensation. The work proposes a *sui generis* mechanism of compensation that is expected to balance the interests of Aboriginal peoples with that of the Crown and other societal perspectives.

At common law, the focus on the determination of damages for an infringement of real property is the *loss of the victim of wrong* and not necessarily the gain of the infringer.<sup>199</sup> Consequently, in extreme cases of loss of property, the courts look at the value of the land to the owner.<sup>200</sup> This reflects the principle of *restitution in integrum*. Hence, the interest sought to be protected by the *Proclamation* through the lens of remedy (being a product of common law) may be said to be *reliance interest*. However, protection of *reliance interest* for a fee simple land and that of an Aboriginal title may have different outcomes because the nature of the rights of both land interests is different. Compensation in the two cases would reflect the rights protected.

Having shown the interest sought to be protected by the *Proclamation* in the lens of remedy which is a creation of common law, the next task is to decipher how to determine the actual measure of compensation due to an Aboriginal group whose interest in their land is infringed. Unfortunately, the *Proclamation* is silent on this. The best clue to this in my view (for now) can be found in *Delgamuukw* where the SCC held that “the amount of compensation payable will vary with the nature of the particular [A]boriginal title affected and with the nature and severity of the infringement and the extent to which [A]boriginal interests were accommodated”.<sup>201</sup> These variabilities outlined by the SCC will be considered at a later part of this Chapter.

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mechanism for compensation in the perspective of the Métis settlements, they concluded that the communities seek to protect four fundamental values which in the view of the communities, remedies should reflect: “traditional values (traditional knowledge and skills, traditional sites, spiritual values); bush values (all plants especially berries, all wildlife, especially moose, respect for the land); community values (health and safety; community cohesion); economic values (financial income to the settlement as part of the new Métis settlements legislation payments related to historical rents).” It is important to state that the research of McDaniels & Trousdale exists within one particular indigenous context of Métis settlements in Alberta. Also, the scholars are outsiders to the tradition seeking to decipher the basis for compensation using indigenous legal tradition and there may be more work to be done on the point by indigenous scholars.

<sup>199</sup> Cassels & Adjin-Tettey, *supra* note 49 at 90.

<sup>200</sup> Isaac, *Aboriginal Title*, *supra* note 93 at 48. See also *Wickham Holdings Ltd. V. Brooke House Motors* [1967] 1 WLR 295.

<sup>201</sup> *Delgamuukw*, *supra* note 2 at 169.

### 2.3 *Indian Act*, RSC 1985<sup>202</sup>

An appraisal of the extant legal principles for the determination of compensation for infringement of Aboriginal title may not be complete without a survey of some relevant provisions of the *Indian Act*<sup>203</sup> that bear on compensation for infringement of Indian reserves. The implications of some of these provisions have received judicial interpretation. This section shall first show the relationship between Indian reserves and Aboriginal title and thereafter, examine the judicial approach to compensation upon infringement of an Indian Reserve.

The *Indian Act* regulates “Indian Territories.” These territories for the purpose of the *Indian Act* may be broadly categorized into two: *Reserve Lands and Surrendered Lands*.<sup>204</sup> While a *Reserve Land* means a tract of land set apart by the Crown for the use and benefit of a particular Indian band, a *Surrendered Land* means an Indian Reserve that has been released or surrendered to the Crown by the Indian band whose use and benefit it is set apart.<sup>205</sup> Attempts have been made to classify Indian Reserves into different categories. One of such attempts is the division of Indian Reserves into *Aboriginal Reserves* and *Granted Reserves*.<sup>206</sup> The former is said to be traceable “to [A]boriginal lands in the Indian Territories,” which derive their form from Aboriginal title.<sup>207</sup> On the other hand, the latter are derived from statutory provisions or Crown grant and not from Aboriginal title.<sup>208</sup>

It is submitted however that the sub-classification of Indian Reserve into *Aboriginal Reserves* and *General Reserves* may not be necessary for the purpose of ascertaining the interest or rights of a particular Indian band in their Reserve. This is because it has long been held by the SCC that Indian

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<sup>202</sup> The examination of the *Indian Act* is very essential as it regulates Indian reserves. The Act has provisions that touch upon the compensation for infringements of the rights and interests of Indian bands in their reserve. This Act gave a strong legal basis for the decision of the SCC in *Guerin v. The Queen* which is to the effect that the mechanism for the determination of compensation for the infringement Indian reserves should employ the fiduciary principles for determination of compensation where a fiduciary breaches his duties. For this See *Guerin v. The Queen* [1984] 2 R.C.S. 335 at 357 and ss 18, 23, 25, 35, 50 and 65 *Indian Act*. See also *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 S.C.R. 746, 2001 SCC 85; *Semiahmoo Indian Band v. Canada*, [1998] 1 FC 3, 1997 CanLII 6347(FCA).

<sup>203</sup> *Indian Act*, RSC 1985.

<sup>204</sup> *Ibid* at s 2.

<sup>205</sup> *Ibid* at s 2.

<sup>206</sup> Slattery, “Understanding Aboriginal Rights”, *supra* note 185 at 770.

<sup>207</sup> *Ibid* at 770.

<sup>208</sup> *Ibid* at 770.

reserves flow from Aboriginal title.<sup>209</sup> This is deducible from the judgment of Dickson J in *Guerin* where he held as follows: “It does not matter, in my opinion, that the present case is concerned with the interest of an Indian band in a reserve rather than with unrecognized [A]boriginal title in traditional tribal lands. The Indian interest in the land is the same in both cases...”<sup>210</sup>

The *Indian Act* has several provisions that bear on the compensation for Indian bands whose interest in their reserve has been breached, surrendered, taken, used, or in circumstances where they are removed from their reserve.<sup>211</sup> First of these provisions and perhaps the one that has received the most attention is Section 18 (1) of the Act. Section 18 (1) of the Act provides as follows:

Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.

The above suggests that the Crown has broad discretion in dealing with a surrendered reserve land; however, the implication of the section has been streamlined in *Guerin*.<sup>212</sup> Before I proceed to examine *Guerin*, it is pertinent to make two important observations about this provision. First is that the provision shows the two categories of interests on an Indian reserve: *The underlying title of the Crown* and *the beneficial interest of the Indian band* to which the land was reserved. This reflects the two interests in the *Proclamation* when viewed through the lens of rights.

The second vital observation to be made about the provision is that it neither expressly mentions compensation nor the method for the measurement of compensation in dealing with the land or upon breach of the section. It is pertinent to state however that sub-section (2) of the provision

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<sup>209</sup> *Ibid* at 771. See also *Guerin*, *supra* note 123 at 379.

<sup>210</sup> *Guerin*, *supra* note 123 at 379. See also *Attorney-General for Quebec v. Attorney-General for Canada*, [1921] 1 A.C. 401, at pp. 410-411.

<sup>211</sup> *Indian Act*, *supra* note 203 at ss 18, 23, 25, 35, 50 and 65.

<sup>212</sup> *Guerin*, *supra* note 123 at 336.

alludes to compensation for a special case whereby upon surrender of an Indian reserve for a specified Indian project, “an individual Indian” was entitled to the possession of those lands.<sup>213</sup> Hence, such compensation is to recompense a particular individual who would suffer a peculiar disadvantage (because of the deprivation of his entitlement to possess) for a project that will be beneficial to all the members of the band. Apart from that special case, Section 18 of the Act does not “expressly” provide for compensation. Again this is akin to the *Proclamation* which gives a right and does not expressly provide for compensation.

In *Guerin*, an Indian band surrendered approximately 162 acres of their reserve lands to the Crown for lease to a golf club. However, the terms obtained by the Crown were much less favourable than those approved by the Band at the surrender meeting.<sup>214</sup> Consequently, the band filed the action against the Crown for breach of trust/ fiduciary obligation under Section 18 (1) of the *Indian Act*. The trial judge found the Crown liable for breach of trust and awarded damages to the Band on the basis of loss of income (valued as of the date of the trial).<sup>215</sup> The Crown’s appeal to the Federal Court of Appeal was allowed, and the Band’s cross-appeal seeking more damages was consequently dismissed. The Band further appealed to the SCC. The two principal questions that came up before the SCC (amongst other issues) are: *what is the implication of Section 18 of the Indian Act and the principles for the measurement of damages for the breach of the duty owed the Indian band for their loss of income.*

As regards the implication of section 18, Wilson J. held that although the section does not expressly create a fiduciary obligation, such obligation has its roots in the Aboriginal title.<sup>216</sup> Thus, Indian bands have a beneficial interest in their reserves, and the Crown has a responsibility to protect that interest.<sup>217</sup> He further held that section 18 is a statutory acknowledgment of that obligation and does not necessarily create it. The SCC justices seem to agree on the existence of a fiduciary obligation upon the Crown in dealing with the reserve of an Indian band which is traceable to Aboriginal title. However, they seem to differ on the particular type of fiduciary obligation

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<sup>213</sup> *Indian Act*, *supra* note 203 at sections 18 (2).

<sup>214</sup> *Guerin*, *supra* note 123 at 335.

<sup>215</sup> *Ibid* at 335.

<sup>216</sup> *Ibid* at 349. See also *Calder v. Attorney General of British Columbia*, [1973] SCR 313.

<sup>217</sup> *Ibid* at 349.



created. Wilson J. held that in that particular case, the fiduciary obligation of the Crown became an *express trust* upon surrender.<sup>218</sup> Dickson J., on the other hand, held that although the Crown owes the Indian band an enforceable duty rooted to Aboriginal title, the Crown's obligation to the Band cannot be called *trust*.<sup>219</sup> Rather, he held that the fiduciary obligation owed to the Indians is *sui generis*.<sup>220</sup> Finally, Estey J. held that the fiduciary relationship created in that case was a simply *agency*.<sup>221</sup>

The nature of the duty owed the Band is crucial to the quantum of damages. This is because the type of fiduciary relationship created ordinarily determines the obligation owed by the Crown which equally determines the principles for the determination of damages upon breach of the obligation. For the measure of damages, Wilson J. did not find it difficult to streamline the principles for the determination of same having held that the fiduciary relationship, in that case, was an express trust. Consequently, the principles for the valuation of damages for breach of trust should hold sway.<sup>222</sup> Generally, in property trust relationships, the measure of damages for breach of trust is the *actual loss* caused to the trust estate.<sup>223</sup> In *Guerin*, one would have expected the valuation of damages to be the difference in value between the lease as expected by the Band and as obtained from the golf club. On the contrary, the trial court having been satisfied by witness testimony that the golf club would not have entered the lease in the terms approved by the Band declined to use that approach.<sup>224</sup> Thus, the learned trial judge awarded a global assessment of \$10 Million to the Band. He did this considering the amount of loss that would have been suffered by the Band on the basis that a golf course lease would probably not have been entered.<sup>225</sup>

The obvious problem with the assessment method of the trial court was that it comfortably assessed the loss of the Band on speculation of what they *might* have suffered in a hypothetical situation rather than what they actually suffered in reality. Perhaps, the learned trial judge did not appreciate

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<sup>218</sup> *Ibid* at 355.

<sup>219</sup> *Ibid* at 375.

<sup>220</sup> *Ibid* at 388.

<sup>221</sup> *Ibid* at 391.

<sup>222</sup> *Ibid* at 357.

<sup>223</sup> *Fales v. Canada Permanent Trust Co.* [1977] 2 SCR 302 at 320. See also David Hayton, Paul Matthews and Charles Mitchell, *Underhill and Hayton: Law of Trusts and Trustees*, 18<sup>th</sup> ed. (London: LexisNexis, 2010) at 1113.

<sup>224</sup> *Guerin*, *supra* note 123 at 357.

<sup>225</sup> *Ibid* at 358.

the fact that the loss of the Band was directly linked to their expectation which was aroused as a result of the fiduciary relationship with the Crown and the particular circumstance of the surrender. In that particular situation, the Band surrendered their land to the Crown on specified terms which the Crown did not follow. The approach of the trial court also seems to pay attention to the principles of causation, remoteness, and foreseeability. These principles are necessary for the determination of damages in tort and contract but not for breach of trust.<sup>226</sup> The determination of damages in cases of breach of trust measures actual loss caused to the trust estate and do not inquire about whether the loss flows from the breach.<sup>227</sup>

The SCC was urged by the Band to review the damages. Wilson J. held that the principle for determination of damages in trust and that of contract are different as there is no need to prove causation and foreseeability.<sup>228</sup> Also, she relied on English and Australian cases to support her position.<sup>229</sup> However, she still found no error in principle in approaching the damages “on the basis of lost opportunity for residential development.”<sup>230</sup> Why base damages on a hypothetical circumstance of residential purposes whereby the loss of the Band can be gleaned from their expectation as clearly communicated to the Crown upon surrender? Dickson J. who earlier found that the surrender does not amount to trust, further held that the measurement of damages should be akin to that of trusts. He also found no error in the approach adopted by the trial court.<sup>231</sup> Finally, Estey J. adopted the same approach even though he held that the surrender gave rise to simple agency and not trust.

*Guerin* recognizes the general fiduciary obligation the Crown owes Indian bands concerning their reserves. Same transcends the *Proclamation* and receives its source from the nature of Aboriginal title. The type of fiduciary relationship now depends on the nature of a particular relationship, treaty, agreement, transaction or circumstances of surrender between the Crown and the Band. The different kinds of fiduciary relationships that can arise from section 18 of the Act may vary, depending on the circumstance of the case and expectation created by the Crown. However, the

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<sup>226</sup> *Caffrey v. Darby* (1801) 31 E.R. 1159.

<sup>227</sup> *Union Bank Trustee Co. v. Perpetual Trustee Co.* (1966)84 WN (Pt. 1) (N.S.W.) (Australia) 399 at 404.

<sup>228</sup> *Guerin*, *supra* note 123 at 362-363.

<sup>229</sup> *Ibid* at 360. See also *Caffrey*, *supra* note 226 at 1159 & *Union Bank Trustee Co.*, *supra* note 227 at 399.

<sup>230</sup> *Ibid* at 363.

<sup>231</sup> *Ibid* at 390-391.

case leaves much to be desired where it comes to the principles for the determination of compensation.

Generally, where there is a breach of fiduciary duty, the principles for the determination of the choice and quantum of remedies depend on the type of the fiduciary relationship and the circumstances of that case. The general options available may be the implementation of a constructive trust, monetary restitution, an award of equitable damages or an accounting for profits (or a combination thereof).<sup>232</sup> For instance, where a fiduciary makes a wrongful gain as a result of his position, the victim of wrong may claim for restitutionary remedies, even where he suffers no loss.<sup>233</sup>

However, breach of property trust is ordinarily compensable on the basis of the actual loss caused to the trust estate even where the trustee makes no profit.<sup>234</sup> It has already been emphasized that there is no need to show a causal link between the breach and the loss. The trust estate just need to prove that there was a trust relationship, a breach of that duty and a loss. In my view, the Band in *Guerin* established this, and the SCC appears to have agreed with them. However, they did not apply the principles that they espoused. The error came in the evaluation of a hypothetical loss as opposed to an actual loss. In this particular relationship, the actual loss of the Indian band is decipherable from the particular expectation created by the Crown's promise which was breached. Hence, instances where there is an express or implied promise by the Crown which creates an expectation, compensation should ordinarily aim to recompense the loss of expectation because therein lies the actual loss.

Other instances of infringements may arise without the Crown specifically creating an expectation. A good instance may be cases of expropriation and grants of tenures in a reserve by the Crown that are inconsistent with continuing Indian interests without consultation or consent. In such a case, a good starting point for the valuation of loss in monetary terms is the determination of the value of the rights and interests infringed. This is because as has earlier been contended in the

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<sup>232</sup> *Semiahmoo Indian Band v. Canada*, [1998] 1 FC 3, 1997 CanLII 6347(FCA) at 25.

<sup>233</sup> *Canadian Aero Service Limited v. O'Malley* [1974] SCR 592 at 621-622.

<sup>234</sup> *Fales*, *supra* note 223 at 320.

previous chapter, compensation for the loss should as far as money can go reflect the value of the loss. There is little specific literature in Canada with respect to the appropriate approach for the valuation of an Indian reserve. However, the SCC has given an insight on what the proper approaches might be in the case of *Musqueam Indian Band v. Glass*.<sup>235</sup> It is important to briefly comment on this case before proceeding to other provisions of the *Indian Act* that bear on compensation.

In *Musqueam Indian Band*, the SCC was invited to interpret the meaning of “the current land value” on a lease agreement. However, their interpretation touches upon the broader context of the valuation of an Indian reserve.<sup>236</sup> In that case, the Crown entered a 99 years lease agreement with a company further to the surrender of an Indian reserve by the Musqueam Indian Band.<sup>237</sup> Pursuant to the agreement, the rent payable for the first 30 years was specified. But there was a rent review clause for every subsequent 20 years. According to the agreement, the rent payable upon review shall be the fair rent for the land representing 6 percent of the “current land value.”<sup>238</sup>

The trial court held that the current value of land is the hypothetical fee simple value of land discounted by 50 percent to take into consideration the long-term leasehold interest and Indian reserve features.<sup>239</sup> The Federal Court of Appeal reversed the decision of the trial court and held that the current land value is the fee simple value without a 50 percent deduction on account of Indian reserve features.<sup>240</sup> The leaseholders appealed to the SCC. The SCC justices were divided in their judgement and reasonings. However, a majority of the SCC upheld the decision of the trial court. Gonthier, Major, Binnie and LeBel JJ conceded that there is nothing like the “fee simple value of an Indian reserve”, but held that such term could be used hypothetically for the purpose of rent review calculation.<sup>241</sup> They held that since the legal restrictions on land use affect the

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<sup>235</sup> See *Musqueam Indian Band v. Glass*, [2000] 2 S.C.R. 633.

<sup>236</sup> The valuation of an Indian reserve done by the SCC in *Musqueam Indian Band* was for the purpose of rent review and not compensation for infringement. However, their decision touches upon the general approach for the valuation of an Indian reserve in a broader context. The examination of this approach is pertinent because compensation should ordinarily reflect the value of loss. Thus, determination of the value of a right in my view solves the issue of valuation of compensation halfway.

<sup>237</sup> *Musqueam Indian Band*, *supra* note 235 at 635.

<sup>238</sup> *Ibid* at 635.

<sup>239</sup> *Ibid* at 635.

<sup>240</sup> *Ibid* at 635.

<sup>241</sup> *Ibid* at 635.

market value of a freehold property, the legal restrictions on an Indian reserve should ordinarily affect its value.<sup>242</sup> They found that the market value of the Musqueam lands was 50 percent of the comparable off-reserve lots.<sup>243</sup>

Bastarache J agreed with the above decision but for different reasons.<sup>244</sup> He held that the land should not be treated as fee simple or valued as such. Rather the current land value should be calculated as leasehold land, including its value as an Indian reserve.<sup>245</sup> He further held that “the relevant market here is not market for the sale of unencumbered land held at fee simple.”<sup>246</sup>

McLachlin C.J. and L'Heureux-Dubé, Iacobucci and Arbour JJ., dissenting, held that the majority position was wrong because fee simple is inconsistent with reserve status and thus “it must be wrong to devalue fee simple for factors related to reserve status.”<sup>247</sup> However, they held that in the particular context of the agreement, the parties intended that the “current land value generally means fee simple value, and common industry practice is to value land by assessing what land would be worth on the open market.”<sup>248</sup> Consequently, they held that no discount should be applied merely because an Indian reserve is the subject of the land.<sup>249</sup>

The concern here should not be the final figures arrived at by the different decisions of the SCC in that case. In my view, the reasoning behind the final decision matters the most.<sup>250</sup> This is why I will dwell more on the reasoning of Bastarache J. Although he did not seem to expound on what the “relevant market” for an Indian reserve might be, his reasoning seems to capture the appropriate approach to be adopted for the valuation of the economic dimension of lands subject to Aboriginal title. The majority contemplates a comparison of two dissimilar variables and superimposing the

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<sup>242</sup> *Ibid* at para 47. The restrictions on the land affect the way the land is to be used and the rights and privileges of the holders of the land. For instance, the land is inalienable except to the Crown. For this, see para 65.

<sup>243</sup> *Ibid* at para 53.

<sup>244</sup> See the full reasoning of Bastarache J's decision on the “current land value” at paras 60-68.

<sup>245</sup> *Musqueam Indian Band*, supra note 235 at paras 61 & 64.

<sup>246</sup> *Ibid* at para 68.

<sup>247</sup> *Ibid* at para 17.

<sup>248</sup> *Ibid* at para 18. This is without prejudice to their view that generally speaking, fee simple and Indian reserves are dissimilar land concepts which should not be compared for the purpose of valuation of the latter.

<sup>249</sup> *Ibid* at para 19.

<sup>250</sup> This should not in any way be implied to mean that the final award does not matter. The reasoning of the judgement of SCC has more implications on future cases.

characteristics of one variable over the other. They compared an Indian reserve with fee simple and arrived at the value of the former by discounting from the value of the latter. These are two different types of land interests with different rights and restrictions. It might be good to compare indigenous land rights with fee simple if the comparison is made in order to draw from the experiences in fee simple for adaptation to the *sui generis* nature of indigenous land rights. Anything less would mean admitting only in principle that indigenous land rights are *sui generis* but denying same upon practical applications. I shall demonstrate later in this chapter in the discussion of principles for determination of compensation in fee simple expropriation cases how fee simple principles applied for valuation compensation upon expropriation of fee simple might be adapted to the *sui generis* nature of Aboriginal title.

Bastarache J's approach, although inchoate is a better view because at least it sets the framework that Indian reserves exist in a different market which should be taken into consideration in the valuation. His opinion is respectfully incomplete because he leaves no clue on where the market is or the principles applied in the market. These are some of the points I will expand in the later part of this chapter under the discussion of expropriation principles.

That said, the *Indian Act* has other provisions that bear on compensation and the principles for determining the quantum. Where those sections come up for interpretation, one should always bear in mind that *Guerin* is an authority that the basis of the relationship between Crown and the Indian bands concerning their reserves is that of a fiduciary which is traceable to the nature of Aboriginal title. *Sparrow*<sup>251</sup> has bound the fiduciary obligation of the Crown to Section 35 of the *Constitution Act*, 1982.<sup>252</sup> This should always be the underlying principle for the evaluation of compensation in the context of Aboriginal title. Measurement of compensation from the lens of a fiduciary relationship will take into consideration the actual loss of the Band which may vary depending on the peculiarities of the case.

Section 35 of the *Indian Act* empowers the Crown to take or use an Indian reserve for public purposes compulsorily. It also provides that upon the compulsory acquisition or use, compensation

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<sup>251</sup> *R. v. Sparrow* [1990] 1 SCR 1075.

<sup>252</sup> McCabe, *supra* note 175 at 161. See also *Sparrow*, *supra* note 251 at 1077.

is payable to a Receiver General for the benefit of the Band.<sup>253</sup> Even though the section is silent about the principles to be considered for the determination of compensation, by *Guerin*, it may not strictly follow the principles of compensation for expropriation of a fee simple. Of course, section 35 of the *Indian Act* may not give rise to a trust or agency relationship as section 18 may allow. However, the fiduciary obligation of the Crown in dealing with an Indian reserve is intrinsic in the reserve. It is an underlying obligation of the Crown, and it should be the foundation upon which compensation for compulsory use or acquisition should be based.

In *Osoyoos Indian Band v. Oliver (Town)*<sup>254</sup> the Attorney General argued that the fiduciary obligations expounded in *Guerin* only apply to surrender and not expropriation of Indian reserve land.<sup>255</sup> However, the SCC *per* McLachlin C.J. disagreed with that contention and held that in the event of expropriation of an Indian reserve for a public purpose under Section 35 of the *Indian Act*, the Crown owes the affected Band a fiduciary obligation, to ensure a minimal impairment of their use and enjoyment of land.<sup>256</sup> Although the quantum of compensation was not an issue, in that case, one can infer that the same fiduciary obligation owed during surrender holds sway during expropriation. Accordingly, the principle of compensation employed in *Guerin* should be applied in expropriation cases. Basing compensation on fiduciary principles should ordinarily consider the Indian perspectives. Their perspectives in any particular circumstance are deducible from their interest in that circumstance. For instance, in *Guerin*, the perspective of the Band is clearly seen through the expectation created by the Crown. In line with this approach, La Forest J. while addressing the issue of compensation held that “...the [A]boriginal peoples must not be forgotten in this equation. Their legal right to occupy and possess certain lands...mandates basic fairness commensurate with the honour and good faith of the Crown.”<sup>257</sup>

The SCC seems to suggest in *Sparrow* that in all circumstances, the relationship between the Crown and Aboriginal peoples is *trust-like* just as held by Dickson J. in *Guerin*.<sup>258</sup> Unlike in *Guerin*, the SCC in *Sparrow* did not distinguish the peculiar circumstances a *trust-like* relationship

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<sup>253</sup> *Indian Act*, *supra* note 203 at s 35 (4).

<sup>254</sup> *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 S.C.R. 746, 2001 SCC 85.

<sup>255</sup> *Ibid* at para 51.

<sup>256</sup> *Ibid* at 52.

<sup>257</sup> *Delgamuukw*, *supra* note 2 at para 204.

<sup>258</sup> *Sparrow*, *supra* note 251 at 1108.

could arise. Pursuant to *Sparrow*, one could argue that in any given circumstance of infringement, the principles for determination of compensation should strictly follow the principles for determination of compensation in trust. However, it is difficult to see characteristics of *trust* in expropriation cases where an Aboriginal community did not surrender their land. Or does “*trust-like*” in the context of *Sparrow* mean a *sui generis* kind of trust that is presumed in any situation due to the nature of an Aboriginal title? These are questions I may not have the answers. However, one principle is clear from these jurisprudences: the relationship between the Crown and Aboriginal peoples is a fiduciary one.

The SCC in *Manitoba Metis Federation Inc. v. Canada (Attorney General)*<sup>259</sup> makes a distinction between a general fiduciary relationship and the accrual of a fiduciary obligation. In that case, it was held that generally the relationship between the Métis and the Crown is fiduciary in nature.<sup>260</sup> However, not all dealings between the Métis and the Crown in a fiduciary relationship are governed by fiduciary obligations.<sup>261</sup> Consequently, the existence of a fiduciary relationship between Aboriginal peoples and the Crown may not automatically impose a fiduciary obligation on the Crown in all the dealings between the parties.

In that case, the Métis sought a declaration that in implementing the *Manitoba Act, 1870*, the federal Crown breached fiduciary obligations owed to the Métis. The court held that “although the Crown undertook discretionary control of the administration of the land grants under ss. 31 and 32 of the *Manitoba Act*, the Métis are Aboriginal, and they had an interest in the land, the first test for fiduciary duty is not made out because neither the words of s. 31 nor the evidence establish a pre-existing communal Aboriginal interest held by the Métis.”<sup>262</sup>

A clear instance where the fiduciary obligation of the Crown will arise is where there is a specific or cognizable Aboriginal interest and there is an undertaking of discretionary control as in *Guerin*.<sup>263</sup> This does not foreclose other instances. The obligation ordinarily arises when the Crown

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<sup>259</sup> *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14.

<sup>260</sup> *Ibid* at para 48.

<sup>261</sup> *Ibid* at para 48.

<sup>262</sup> *Ibid* at 627.

<sup>263</sup> *Ibid* at para 51.



assumes a sufficient amount of discretion over a cognizable Aboriginal interest.<sup>264</sup> Such instances should include expropriation and grants of tenures by the Crown that are inconsistent with continuing and cognizable Aboriginal interests in land.

Having determined that the relationship between an Aboriginal community and the Crown as regards an Aboriginal title is that of a fiduciary, it is now pertinent to examine in a Canadian context how an Aboriginal perspective might be considered alongside the underlying interest of the Crown in the valuation of compensation. This may be seen in the four variabilities set out in *Delgamuukw*.

#### **2.4 *Delgamuukw*: “Variabilities” that Determine Compensation for Infringement of Aboriginal Title.**

Compensation will always depend on the nature of a breach, the nature of the relationship between the infringer and the victim of wrong, the degree of infringement and other factors that may in certain circumstances mitigate the liability of the infringer. Thus, absolute certainty in the field of compensation may be impossible. The best approach towards certainty as regards the principles for the determination of compensation seems to be to take note of the factors that may vary in different cases of compensation and design an approach that is malleable to those different circumstances and can be used in determining compensation as cases of breach arise.

Further to the above and in application to infringement of Aboriginal title, Lamer CJ held that “[t]he amount of compensation payable will vary with the nature of the particular [A]boriginal title affected and with the nature and severity of the infringement and the extent to which [A]boriginal interests were accommodated.”<sup>265</sup> The SCC did not however analyze these factors and their role in the determination of compensation. Being the best guidance so far by the SCC as regards the principles for determination of compensation, it is important to put some flesh to these factors to see the possible implications they might have.

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<sup>264</sup> Dickson, *supra* note 32 at 20.

<sup>265</sup> *Delgamuukw*, *supra* note 2 at para 169.

These factors should ordinarily determine the quantum of compensation. Hence, an insight into the possible implications of these factors will show how the quantum of compensation may vary depending on the facts and circumstances of the case. These factors may also reflect the degree of loss caused by an infringement which the compensation seeks to remedy. For instance, the nature of an Aboriginal title land encompasses the particular components of the land and the value of those components which should invariably determine the quantum of compensation to remedy the loss caused to those components. The degree of infringement reflects the extent of harm done to the components of the land which also shows the diminished value or losses occasioned by the infringement. The extent of accommodation of Aboriginal interest shows the steps taken by the Crown to recompense for their act or omission which may have met some of the underlying aims of compensation. An increase in the extent of accommodation should ordinarily reduce the loss of an Aboriginal group affected, which consequently reduces the quantum of compensation.

This section further explores these factors to examine the possible implications they might have in the determination of compensation for infringement of Aboriginal title.

#### **2.4.1 Nature of Aboriginal Title**

The nature of Aboriginal title can be viewed through two broad perspectives: *The general nature of an Aboriginal title and the particular nature of Aboriginal title*. The general *sui generis* nature of Aboriginal title has been examined in chapter one. This applies to all Aboriginal title lands, irrespective of location, size, and content. It is based on the *general nature of Aboriginal title* that the Crown has been held to be a fiduciary and therefore the measurement of the award of compensation for infringement of Aboriginal title should generally follow fiduciary principles.<sup>266</sup> It is also based on the general nature of Aboriginal title that the *usual (fee simple) expropriation principles* may not be exclusively relied upon in the valuation of compensation for infringement of Aboriginal title. The defense to this submission is seen in *Delgamuukw* where La Forest J emphasized that fair compensation for Aboriginal title is not to be equated with the price of a fee simple.<sup>267</sup>

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<sup>266</sup> *Guerin*, *supra* note 123 at 362-363.

<sup>267</sup> *Delgamuukw*, *supra* note 2 at para 203.

It may be argued that the *nature of Aboriginal title* referred to by Lamer CJ in *Delgamuukw* does not mean the *general nature of Aboriginal title*. This is because, upon establishment of Aboriginal title, the *general nature of Aboriginal title* ceases to be a variable. At that point, it can be said to be fixed and constant. Therefore, the application of compensation principles based on fiduciary principles should ordinarily be the basis for all the determination of compensation upon an infringement of Aboriginal (as the underlying relationship between the Crown and Aboriginal peoples as regards Aboriginal title is that of a fiduciary). Thus, it should be applied in all cases of infringements of Aboriginal title, and its implication will consequently be dependent on the variables referred to by Lamer CJ. It is important to make this distinction because some scholars have treated the *general nature of Aboriginal title* as a variable, which is arguably not what Lamer CJ meant.<sup>268</sup> The *general nature of Aboriginal title* is the essence of the title and the foundation upon which all dealings with the title stands. Hence, the application of the principles drawn from it is not on case to case bases; rather it may be said to be constant in all dealings with Aboriginal title including the determination of compensation.

What then did Lamer CJ mean when he mentioned the *nature of Aboriginal title* as a variable? He held specifically that “[t]he amount of compensation payable will vary with the nature of the particular [A]boriginal title affected...”<sup>269</sup> Lamer CJ was referring to the *particular nature of Aboriginal title*. The *particular nature of Aboriginal title* signifies the peculiarities of a specific Aboriginal title land that makes it different from another Aboriginal title land. Hence, *the particular nature of Aboriginal title* varies from case to case. For instance, the degree of Aboriginal peoples’ connection with their land may vary (but this does not affect the *general nature of Aboriginal title*).<sup>270</sup>

The things that make a specific Aboriginal title different from the other need not necessarily be intangible and may also not necessarily be linked to the traditional use of the land. For instance, the *Indian Oil and Gas Act*<sup>271</sup> “presumes that the Aboriginal interest in reserve land includes

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<sup>268</sup> Michael J. McDonald & Thomas Lutes, “Compensation after *Delgamuukw*: Aboriginal Title’s Inescapable Economic Component” in Owen Lippert ed, *Beyond the Nass Valley: National Implications of the Supreme Court’s Delgamuukw Decision* (Vancouver: The Fraser Institute, 2000) at 434.

<sup>269</sup> *Delgamuukw*, *supra* note 2 at para 169 (Emphasis added).

<sup>270</sup> *Ibid* at para 139.

<sup>271</sup> *Indian Oil and Gas Act* RSC, 1985, c I 7.

mineral rights.”<sup>272</sup> Also, “on the basis of *Guerin*, [A]boriginal title also encompass mineral rights, and lands held pursuant to [A]boriginal title should be capable of exploitation in the same way, which is certainly not a traditional use for those lands.”<sup>273</sup> If a certain Aboriginal title, for example, possesses some minerals and it is infringed for exploration/mining of the resources, the existence of the minerals should ordinarily be put into consideration in the calculation of compensation. This falls under the purview of the *particular nature of Aboriginal title*. Thus, depending on the peculiarities of a particular Aboriginal title, extraneous principles could be introduced for assessing compensation for the purpose of those peculiarities.

For instance, the *Indian Oil and Gas Regulation*<sup>274</sup> has some provisions that relate to *negotiated compensation* for exploration licenses, lease, permits, and request for entry of an Indian reserve in advance of surface lease.<sup>275</sup> Under the *Regulation*, a prospective oil exploration licensee must undertake to pay to an Indian Band an amount equivalent to the compensation received by other Bands in the locality for similar operations conducted on similar lands.<sup>276</sup> Also, the licensee undertakes to pay for any damaged caused by the exploration work.<sup>277</sup> Also, a person who proposes to engage operations in Indian lands for exploration of oil has to negotiate compensation for any anticipated incidents of damage or nuisance.<sup>278</sup> Compensation for damage caused in the land seems to bring in principles of causation which may not be ordinarily considered in cases of infringement of Aboriginal title because of the compensation principles in fiduciary relationships, but because of the *particular nature of the Aboriginal title* in such circumstance, the principle of causation may be brought in only for the purpose of determining compensation for the damage caused by the exploration.

It is important to state at this juncture that the *particular nature of Aboriginal title* does not negate its *underlying nature (the general nature of Aboriginal title)* and the rights given therein. Thus, the variations in the *particular nature of Aboriginal title* does not affect the constant fiduciary obligation owed the Aboriginal peoples by the Crown. This seems to be the implication of

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<sup>272</sup> *Ibid* s. 2 & 4; *Delgamuukw*, *supra* note 2 at para 122; *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344.

<sup>273</sup> *Delgamuukw*, *supra* note 2 at para 122.

<sup>274</sup> *Indian Oil and Gas Regulations*, 1995 SOR/94-753.

<sup>275</sup> *Ibid* at ss. 6, 24, 27 & 30.

<sup>276</sup> *Ibid* at s 6(2)(i).

<sup>277</sup> *Ibid* at s 6 (2) (ii).

<sup>278</sup> *Ibid* s 27 (2) (iii).

*Blueberry River Indian Band v. Canada* where the principal issue was the surrender of mineral rights in an Indian reserve. The SCC held that the Indian Band might recover for losses due to the Crown's breach of its fiduciary duties.<sup>279</sup> Gonthier J further held that "...when determining the legal effect of dealings between [A]boriginal peoples and the Crown relating to reserve lands, the *sui generis* nature of [A]boriginal title requires courts to go beyond the usual restrictions imposed by the common law, in order to give effect to the true purpose of the dealings."<sup>280</sup> The issue in that case was not the measurement of damages, however from the judgement, one would only expect that fiduciary principles of calculation of compensation as found in *Guerin* (although it was strictly not followed) would ordinarily apply to determine the actual loss of the Indian band.

The use of mineral rights for the illustration of the point here may actually not be the most appropriate choice. This is because it is not settled whether or not Aboriginal title includes mineral rights. While some scholars argue that the status of mineral rights on Aboriginal title lands may be uncertain, others challenge that position.<sup>281</sup> That said, arguments along these lines are beyond the scope of this research. The mineral rights illustration is just used to explain the meaning of *the particular nature of Aboriginal title*.

Factors that may constitute *the particular nature of Aboriginal Title* may not be exhaustive. Other factors that come to mind are factors like the size of the land and location. These factors should ordinarily contribute to the evaluation of compensation in any property infringement. Of course, the *particular nature of Aboriginal title* does not act alone in the determination of compensation. It will be considered hand in hand with other variabilities to be considered.<sup>282</sup>

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<sup>279</sup> *Blueberry River Indian Band*, *supra* note 272 at para 23.

<sup>280</sup> *Ibid* at para 7.

<sup>281</sup> For this, see Dwight Newman, *Mining Law of Canada* (Toronto: LexisNexis, 2018) at 66. Newman argues that "...the status of mineral rights on Aboriginal title lands is in my respectful view, uncertain. There was an *obiter* statement in 1997 in *Delgamuukw v. British Columbia* that suggested that Aboriginal title lands included surface minerals. However, the particular reasoning in the passage is highly strained and based on the conclusion on a presumption allegedly found in certain statutes, but it is unclear why what were actually certain boiler-plate provisions in those statutes so as to avoid affecting any surface mineral rights either way would be determinative on this issue" See also Karen Drake's view on this issue which challenge's Newman's view: Karen Drake, "The Trials and Tribulations on Ontario's Mining Act: The Duty to Consult and Anishinaabek Law" (2015) 11 McGill J. Sustainable Development Dev. L. Pol'y 183.

<sup>282</sup> McDonald & Lutes, *supra* note 268 at 438.

### 2.4.2 Nature of Infringement

Compensation may also vary depending on the particular nature of the infringement. To properly understand the nature of infringement of an Aboriginal title, it is important to first understand the general nature of the relationship between the Crown and Aboriginal peoples. It has been settled and also emphasized in different parts of this thesis that the nature of the relationship between the Crown and Aboriginal peoples is that the Crown acts in a fiduciary capacity.<sup>283</sup> Some cases have given the impression that the fiduciary capacity of the Crown gets activated upon the happening of an event (e.g., upon surrender of land). For instance, in *Semiahmoo Indian Band v. Canada*,<sup>284</sup> the Federal Court of Appeal held that “surrender requirement is the source of Crown’s fiduciary obligation.”<sup>285</sup> This appears not to be the correct position of the law. In addressing the relationship between Aboriginal peoples and the Crown, the SCC (per Dickson CJ and La Forest J) in *Sparrow* held as follows:

The *sui generis* nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation. In our opinion, *Guerin*, together with *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360, ground a general guiding principle for s. 35(1). That is, the Government has the responsibility to act in a fiduciary capacity with respect to [A]boriginal peoples. The relationship between the Government and [A]boriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.<sup>286</sup>

The above confirms and perhaps gives more flesh to the earlier position of the SCC in *Guerin*. Thus, contrary to the impression in *Semiahmoo Indian Band* and some other cases, the Crown’s fiduciary obligation to the Aboriginal peoples does not accrue upon the happening of a contingency, because the nature of the relationship between the Crown and Aboriginal peoples in all their dealings is that of a fiduciary. Whether or not there is a breach of that fiduciary relationship is what is contingent on the action of the Crown, and that is another issue altogether. Therefore, it

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<sup>283</sup> *Sparrow*, *supra* note 251 at 1108.

<sup>284</sup> [1998] 1 FC 3, 1997 CanLII 6347 (FCA), <<http://canlii.ca/t/4n41>>.

<sup>285</sup> *Ibid* at 12.

<sup>286</sup> *Sparrow*, *supra* note 251 at 1108 (Emphasis added).

is submitted that the obligation of the Crown in dealing with Aboriginal title in whatever circumstance and for whatever purpose is that of a fiduciary.

Furthermore, one may therefore contend that the nature of any infringement of Aboriginal title by the Crown is to be viewed as a breach of the Crown's fiduciary obligation. This may not also be an accurate position. The accuracy of that contention would depend on whether the infringement is justified or not. If the infringement is unjustified, then the Crown has breached its fiduciary obligations. On the other hand, a justified infringement presupposes that the Crown has met its fiduciary obligations. One of the tests for justification of infringement is that the act of the Crown is consistent with the special fiduciary relationship between the Crown and Aboriginal peoples.<sup>287</sup> The standard for the evaluation of the fiduciary obligation of the Crown is the *honour of the Crown*.<sup>288</sup> Of course, it is trite that in keeping with the duty of honour and good faith on the Crown, compensation valued in line with fiduciary principles may ordinarily be required when Aboriginal title is infringed.<sup>289</sup>

What then does the *nature of infringement* mean in the context it was used in *Delgamuukw* and how does it affect compensation? *Nature of infringement* should ordinarily encompass the nature of a *particular* relationship between the Crown and a particular Aboriginal group and the nature of the action, decision or omission of the Crown that results to a breach of the fiduciary obligation owed. Breach of fiduciary obligations may take different forms, and such may consequently make the appropriate remedial considerations vary.<sup>290</sup> "An innocent and honest bit of bad advice", "a failure of a timely warning" and "an action akin to deceit or theft" may all amount to a breach of fiduciary obligation but may result in different awards of compensation.<sup>291</sup> The majority decision in *Canson Enterprises Ltd. v. Boughton & Co.*<sup>292</sup> made this distinction. In that case, a fiduciary (a solicitor preparing a conveyance) failed to advise clients (purchasers of property) about secret profits made on a flip. When the appellants (clients) invited the court to calculate damages using the *trust principles* as expounded in *Guerin*, the majority of the SCC held as follows:

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<sup>287</sup> *Delgamuukw*, *supra* note 2 at para 162; *Tsilhqot'in Nation*, *supra* note 6 at para 77.

<sup>288</sup> McCabe, *supra* note 175 at 161.

<sup>289</sup> *Delgamuukw*, *supra* note 2 at para 169.

<sup>290</sup> McCabe, *supra* note 175 at 210.

<sup>291</sup> *Ibid* at 210.

<sup>292</sup> *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534.

The appellants urged us to accept the manner of calculating compensation adopted by the courts in trust cases or situations akin to a trust, and they relied in particular on the *Guerin* case, *supra*. I think the courts below were perfectly right to reject that proposition. There is a sharp divide between a situation where a person has control of property which in the view of the court belongs to another, and one where a person is under a fiduciary duty to perform an obligation where equity's concern is simply that the duty be performed honestly and in accordance with the undertaking the fiduciary has taken on...<sup>293</sup>

It is a basic principle of fiduciary relationships that a fiduciary must not make secret profits.<sup>294</sup> In such a situation, remedies may follow the principle of restitution of the profits made, even where the victim of wrong does not suffer loss.<sup>295</sup> Therefore, the damages will be calculated on the basis of the gain of the infringer and not the loss of the victim of wrong. Whereas for other forms breach of fiduciary relationships, even where the infringer makes no gain as in *Guerin* but the victim of wrong suffers loss, the principle of calculation of damages will vary to address the particular nature of the breach. The principle in *Guerin* shows that the actual loss of the victim of wrong is the basis of calculation.

What amounts to the *actual loss of the victim* will depend on the circumstances surrounding a case and considering other variabilities as well. For instance, in *Guerin* the Crown raised the hope of the Indian band by giving them a “particular expectation”; compensation for the actual loss of the Band should ordinarily consider the particular expectation of the Band, even if the expectation is more than the fair value of other reserves around the Band’s title.

Even where a fiduciary makes no particular promise to the beneficiary, the law expects a particular standard of conduct from the fiduciary to put the beneficiary in a favourable position. In *Whitefish Lake Band of Indians v. Canada*<sup>296</sup> an Indian band surrendered the timber rights of their reserves

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<sup>293</sup> *Ibid* at 578.

<sup>294</sup> *Semiahmoo Indian Band*, *supra* note 232 at 25.

<sup>295</sup> *Ibid* at 25.

<sup>296</sup> *Whitefish Lake Band of Indians v. Canada* (Attorney General), 2007 ONCA 744 (CanLII).



to the Crown; however, the Crown breached its fiduciary duty by failing to obtain a fair value of the timber rights. Although the Band had no particular expectation, the Court of Appeal of Ontario held that equity presumes that a fiduciary should account to a beneficiary on the basis most favorable to the beneficiary, *discounting realistic contingencies*.<sup>297</sup> Again, what amounts to “realist contingencies” would depend on the circumstances of the case. In that case, while considering one of the “realistic contingencies” to be deducted, it was held that “over the years, the [B]and would have spent some of the interest earned on the capital investment...” With respect, as realistic as that might seem, at best, it is in my view a “speculative contingency.” The court did not take into cognizance of the fact that it is also a “realistic contingency” that the Band could have decided to save over the years. All these factors are speculative and should not be ordinarily factored in the determination of compensation unless in a particular case there is a compelling fact (as opposed to speculation) to base such.

Succinctly, three points can be made about the principles that inform compensation. First, the general nature of an unjustifiable infringement of Aboriginal title by the Crown is that it is a breach of a fiduciary obligation. This particular point does not vary. Hence, the foundation for the valuation of damages for infringement in such circumstance is fiduciary principles. However, the particular approach that would be employed for the determination of compensation depends on the *particular nature of the infringement*. The particular nature of infringement varies and depends on the circumstances surrounding the case. Finally, the principle for the determination of compensation to justify an infringement in order to meet the honour and good faith the Crown still flows from the principles of fiduciary relationship of the Crown and the Aboriginal peoples. The valuation formula here would still vary, depending on the nature of the particular infringement and other variabilities.

### **2.4.3 Severity of Infringement**

The severity of the action, decision or omission of the Crown that amounts to an infringement of the fiduciary obligation owed Aboriginal peoples is a crucial factor to be considered for the award of compensation for infringement of Aboriginal title. Generally, the actual loss of a victim of wrong upon an infringement may be said to be directly proportional to the degree of infringement

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<sup>297</sup> *Ibid* at para 110.

which is as a result of the action, decision or omission of the infringer. Thus, the actual loss of the victim should therefore be a reflection of the degree of infringement. Consequently, the higher the degree of infringement, the higher the compensation of the victim of wrong.

The assessment of infringement may not pose so much of a problem where the loss of the victim of wrong is tangible or pecuniary. In such a circumstance, the actual loss of the victim will be the value of the “tangible property.” However, there may be some complications as regards the assessment of the actual loss of the victim of wrong in cases of intangible losses. The courts have developed a functional approach for the award of damages in such circumstances.<sup>298</sup> The amount of the damages is gotten by the examination of the seriousness of injuries suffered by the victim and assessing the physical and other arrangements that money may be spent on to assuage the feelings of the victim.<sup>299</sup>

The SCC also held in *Lindal v. Lindal*,<sup>300</sup> that the amount of compensation should not only be based on the seriousness of the injury but should extend to its capacity to ameliorate the condition of the victim of wrong in a particular circumstance.<sup>301</sup> What this decision might mean was illustrated in *Andrews v. Grand & Toy Alberta Ltd.* In that case, it was held that the loss of a finger for an amateur pianist and that of a professional pianist should be valued differently.<sup>302</sup> This is because the finger is of more value to the amateur and greater compensation would be required to put things together that will make him function and make up for his losses.<sup>303</sup> Thus, the idea of the award of compensation is to alleviate the disaster faced by a victim after the particular facts and circumstances of the case are considered.<sup>304</sup>

Analogizing from the loss of finger illustration, the degree of infringement of Aboriginal title depends on the nature of the particular Aboriginal title infringed and the particular action of the Crown. Thus, an infringement that seriously damages an Aboriginal community’s connection to

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<sup>298</sup> *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 263.

<sup>299</sup> Cassels & Adjin-Tettey, *supra* note 49 at 195.

<sup>300</sup> *Lindal v. Lindal*, [1981] 2 S.C.R. 629.

<sup>301</sup> Cassels & Adjin-Tettey, *supra* note 49 at 195.

<sup>302</sup> *Andrews*, *supra* note 298 at 264.

<sup>303</sup> *Ibid* at 264.

<sup>304</sup> *Warren v. King* [1963] 3 All E.R. 521 at 528.

the land and affects their culture adversely should result to a higher compensation than an infringement that mildly affects same.<sup>305</sup> Another important consideration is the duration of such infringement. A one-time infringement will certainly be in a different realm of compensation than an infringement of years of deprivation of an Aboriginal community of their lands.<sup>306</sup>

For instance, in *Semiahmoo Indian Band* where the Crown deprived an Indian band of their reserve for more than 40 years, the Federal Court of Appeal held that “a monetary award *simpliciter* would be an inadequate remedy for the respondent's actionable breach of fiduciary duty...it is appropriate in these circumstances for the Court to create a beneficial interest in the surrendered land for the Band by imposing a constructive trust.”<sup>307</sup> Although the court did not address compensation that is due to the Band, it referred the matter back to the trial court for assessment. However, they gave the trial court a guide on how to go about the assessment considering the gravity of the infringement.<sup>308</sup> The Crown’s defense that the land was not used the whole time was held to be immaterial.<sup>309</sup> Relying on the SCC decision in *Hodgkinson v. Simms*<sup>310</sup> the Court further held that fiduciary law contains within it an element of deterrence.<sup>311</sup> This appears to be compensation based on the retributive interest as examined in the previous chapter. Thus, a remedy based on the principles of a constructive trust for the period of deprivation even though the Crown made no pecuniary gain will signal to the Crown that it should have due regard to the interest of Indian Bands.<sup>312</sup> This case illustrates how the gravity of infringement is to be put into consideration while accessing compensation.

Another question that flows from the above analysis especially as it relates to infringement for a lengthy period is: what value of land would the court rely on in determining the actual loss of the Aboriginal community, because the “value” of the land may have changed over time. In *Guerin*, it was held that “[t]he lost opportunity to develop the land for a lengthy period was to be compensated as at the date of trial notwithstanding the fact that market values may have increased since the date

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<sup>305</sup> McDonald & Lutes, *supra* note 268 at 439.

<sup>306</sup> *Ibid* at 439.

<sup>307</sup> *Semiahmoo Indian Band*, *supra* note 232 at 27 (Emphasis added).

<sup>308</sup> *Ibid* at 27.

<sup>309</sup> *Ibid* at 26.

<sup>310</sup> *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at p. 453

<sup>311</sup> *Semiahmoo Indian Band*, *supra* note 232 at 26.

<sup>312</sup> *Ibid* at 26.

of the breach.”<sup>313</sup> This is because equity presumes that the Aboriginal community would have intended to develop their land in the *most advantageous* way possible during the time covered by an unauthorized lease, license or sale of land.<sup>314</sup>

#### **2.4.4 Accommodation of Aboriginal Interest**

Compensation payable for the infringement of Aboriginal title may be mitigated by the extent to which the Aboriginal interests at issue are accommodated.<sup>315</sup> Therefore, the higher the accommodation, the lesser the compensation payable.<sup>316</sup> This is because compensation seeks to cover the actual loss of the Aboriginal group whose title is infringed and accommodation may be said to have reduced the actual loss depending on the extent. The level to which accommodation can mitigate infringement depends on the severity of infringement and the extent of accommodation, having regard to the nature of the particular Aboriginal title.

There are several ways by which the Crown may accommodate the interest of a particular Aboriginal group. The general rule remains that the Crown owes Aboriginal peoples a fiduciary obligation measured by the honour and good faith of the Crown. The implication of this, of course, depends on the circumstances of the case. For instance, in expropriation cases, the Crown owes the affected Aboriginal group a fiduciary obligation, to ensure a minimal impairment of their use and enjoyment of land.<sup>317</sup>

For there to be a reasonable accommodation of the interest of an Aboriginal group, the first step is to consult them for the purpose of their participation in the decision taken concerning their lands. This was what Lamer CJ meant when he held as follows:

This aspect of [A]boriginal title suggests that the fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands. There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to

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<sup>313</sup> *Guerin*, *supra* note 123 at 339.

<sup>314</sup> *Ibid* at 339.

<sup>315</sup> Isaac, *Aboriginal Title*, *supra* note 93 at 47.

<sup>316</sup> *Ibid* at 47.

<sup>317</sup> *Osoyoos Indian Band*, *supra* note 254 at 62.

determining whether the infringement of aboriginal title is justified, in the same way that the Crown's failure to consult an aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law.<sup>318</sup>

It is upon proper consultation that the Crown would know how to accommodate their interests. Accommodation in the context of proven Aboriginal title may arguably work differently from the accommodation expounded in the modern doctrine of the duty to consult. The modern doctrine of the duty to consult deals with asserted Aboriginal rights (including asserted Aboriginal title).<sup>319</sup> The whole idea in *Haida v. Nation v. British Columbia (Minister of Forests)* which established the modern doctrine of the duty to consult is that the Crown has the duty to consult an Aboriginal group where the decision of the government might have an impact on their asserted rights and *if appropriate* accommodate their interest (perhaps upon assessment of the potential impacts of the governmental decision and the strength of the interest).<sup>320</sup> An established Aboriginal title may have a different standard as regards consultation and accommodation. This is deducible from the decision of the SCC in *Tsilhqot'in Nation* where it was held as follows:

The right to control the land conferred by Aboriginal title means that governments and others seeking to use the land must obtain the consent of the Aboriginal title holders. If the Aboriginal group does not consent to the use, the government's only recourse is to establish that the proposed incursion on the land is justified under s. 35 of the *Constitution Act, 1982*.<sup>321</sup>

Further to the above, accommodation of the interest of an Aboriginal group with respect to an established Aboriginal title intended to be used by the Crown should ordinarily be *always applicable* as opposed to the accommodation for asserted rights pursuant to the modern doctrine of the duty to consult where the circumstance of the case determines whether or not accommodation is applicable. This is because, for an established Aboriginal title, the government has a duty to get the consent of the Aboriginal group involved if it seeks to use the land. Even if

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<sup>318</sup> *Delgamuukw*, *supra* note 2 at para 168.

<sup>319</sup> See *Haida v. Nation v. British Columbia (Minister of Forests)* (2004) SCC 73.

<sup>320</sup> Newman, *Revisiting the Duty to Consult Aboriginal Peoples*, *supra* note 39 at 15.

<sup>321</sup> *Tsilhqot'in Nation*, *supra* note 6 at para 77 (Emphasis Added).

the government opts to use the route of justified infringement, it still has a duty to accommodate the interests of the Aboriginal group involved in order to uphold the honour of the Crown.

Thus, where there is no accommodation of the Aboriginal group whose title has been infringed, they will be entitled to the highest level of compensation payable which an accommodation may have achieved.

The plausible ways to accommodate the interest of an Aboriginal group after consulting them include:

1. Accommodation of the participation of an Aboriginal group in the development of the resource on their land.<sup>322</sup>
2. Reduction of economic barriers to Aboriginal uses of their lands (e.g., licensing fees).<sup>323</sup>
3. Negotiated compensation.
4. Revenue sharing.
5. Provision of suitable alternative land etc.<sup>324</sup>

## 2.5 Specific Claims Tribunal Act

The *Specific Claims Tribunal Act (SCTA)*<sup>325</sup> is very pertinent to this research as it establishes the Specific Claims Tribunal (SCT) to decide cases of “validity and compensation” concerning the specific claims of First Nations identified in the legislation.<sup>326</sup> The Acts further provide the approach to be adopted by the Tribunal while determining compensation for valid claims.<sup>327</sup> The Act only affects the rights of a First Nation where the First Nation chooses to file a claim in the Tribunal.<sup>328</sup> The specific claims that the Act contemplates are chiefly old historic claims that may be precluded from adjudication in the superior courts due to the passage of time.<sup>329</sup> Before the establishment of the Tribunal, such claims were adjudicated upon by the Minister without any

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<sup>322</sup> *Delgamuukw*, *supra* note 2 at para 167.

<sup>323</sup> *Ibid* at para 167.

<sup>324</sup> *Sam Adkins et al*, *supra* note 10 at 365.

<sup>325</sup> *Specific Claims Tribunal Act, (SCTA)* S.C. 2008, c. 22.

<sup>326</sup> *Kitselas First Nation v. Her Majesty the Queen in Right of Canada*, 2013 SCTC 1 at para 26. See also *SCTA*, *supra* note 325 at s 3.

<sup>327</sup> For this see *SCTA*, *supra* note 325 at s 20.

<sup>328</sup> *Ibid* at s 5.

<sup>329</sup> *Kitselas First Nation*, *supra* note 326 at para 26.

binding or independent mechanism.<sup>330</sup> Consequently, the fundamental purpose of the Tribunal which consists of superior court judges from across Canada is to determine such claims by the Act, without considering any doctrine that would preclude the claim because of lapse of time or delay.<sup>331</sup>

The mandate of the Tribunal is in two dimensions one of which directly bears on the discussion in this chapter. First, the Tribunal judge must determine the validity of the claim.<sup>332</sup> Second, upon the determination that the claim is valid, the judge must determine the appropriate level of compensation owed the First Nation in accordance to section 20 of the Act.<sup>333</sup> Thus, the Tribunal is set up with a mandate to award monetary compensation for claims of a First Nation arising from the Crown's breach of its duties to them.<sup>334</sup>

Section 20 of the Act provides a framework for the determination of the appropriate level of compensation. Some of the mechanisms that section 20 provides are as follows:

1. Compensation must be monetary.<sup>335</sup>
2. The Tribunal does not have the jurisdiction to grant compensation in excess of \$150 Million.<sup>336</sup>
3. The compensation shall be based on the principle of compensation applied by the courts.<sup>337</sup>
4. Compensation is for only tangible losses. Intangible losses that have cultural or spiritual nature are not compensable under the Act.<sup>338</sup>
5. Compensation is calculated based on the market value of the First Nation's reserve at the time they were taken brought forward to the current value of the loss in accordance with legal principles by the courts.<sup>339</sup>

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<sup>330</sup> *Ibid* at para 26.

<sup>331</sup> *Ibid* at para 26.

<sup>332</sup> *Ibid*, at para 27. What constitutes grounds for valid claim is contained in s 14 of *SCTA*.

<sup>333</sup> *Ibid* at para 27.

<sup>334</sup> *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4.

<sup>335</sup> *SCTA*, *supra* note 325 at s 20 (1) (a).

<sup>336</sup> *Ibid* at s 20 (1) (b).

<sup>337</sup> *Ibid* at s 20 (1) (c). The Act does not specify the particular principles applied by the courts which it contemplates.

<sup>338</sup> *Ibid* at s 20 (d) (ii).

<sup>339</sup> *Ibid* at s 20 (e).

6. Where a third party causes or contributes to the acts of infringement, the award of compensation against the Crown shall only be to the extent that the Crown is at fault for the loss.<sup>340</sup>

The above principles show that the jurisdiction of the Tribunal is limited to the award of compensation for economic losses on the reserves of First Nation due to the acts or decisions of the Crown. The jurisdiction of the Tribunal does not extend to non-economic or intangible losses of culture or spirituality. Also, in the determination of the quantum of compensation, the Act mandates the Tribunal to follow the principles of compensation applied by the courts. This provision in itself may be problematic because the superior courts are yet to develop precise legal principles to be used for determination of compensation for infringement of indigenous rights and interests in land.<sup>341</sup>

The Tribunal through their decisions has interpreted section 20 of the Act, especially what the drafters of the Act may have contemplated as “principles of compensation applied by the courts.”<sup>342</sup> The jurisprudence show that where the claim of a First Nation has been determined to be valid under the Act (which precedes the determination of compensation), it presupposes that the act, omission or decision of the Crown is a breach of its fiduciary obligation as expounded *Guerin*.<sup>343</sup> Further, in *Popkum First Nation v. Canada (Indian Affairs and Northern Development)* the Tribunal held that “where the fiduciary breach has resulted in a lost opportunity to use the lands, the plaintiff is entitled to be compensated for that loss of use based on the presumption that those lands would have been put to the “most advantageous” use.”<sup>344</sup> What may constitute the “most advantageous” use would be dependent on the facts and circumstances surrounding the case. This is the same principle that was expounded in *Guerin*.

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<sup>340</sup> *Ibid* at s 20 (i).

<sup>341</sup> The reliance on the principles adopted by the courts may be a huge gap in the administration of the Act because there is yet to be developed by both the Parliament through legislative action and the superior courts through decisions comprehensive legal principles that contemplate the *sui generis* nature of the indigenous land rights in the award of compensation for infringements in practical circumstances.

<sup>342</sup> See *Popkum First Nation v. Canada (Indian Affairs and Northern Development)*, 2016 SCTC 12; *Huu-Ay-Aht First Nations v. Canada (Indian Affairs and Northern Development)*, 2016 SCTC 14.

<sup>343</sup> *Williams Lake Indian Band*, *supra* note 334 at para 48.

<sup>344</sup> *Popkum First Nation*, *supra* 342 at para 70.



According to the Tribunal, the aim of the remedy is to put the First Nation in a position they would have been had the breach not occurred.<sup>345</sup> To achieve this, the Tribunal held that the monetary compensation provided in section 20 (1) (a) of the Act has to be restitutionary.<sup>346</sup> The approach of the Tribunal appears to be a conflation of the protection of both the reliance and restitution interests, and this may appear confusing. This is because for a First Nation to be put in a position they would have been had the infringement not occurred, the monetary compensation has to be of such that as far as money can go should cover the actual loss of the First Nation. On the other hand, if the monetary compensation is to be restitutionary, then the focus shifts from the actual loss of the First Nation to the gain of the Crown. The Tribunal's decision gives the impression that the gain of the infringer and the actual loss of the victim of loss are always equal. It is arguably not always the case.

## 2.6 Modern Treaties

Some jurists contend that modern treaties give an insight on how to balance the interest of the Aboriginal peoples with that of the Crown in the determination of compensation while also fulfilling the underlying aim of compensation.<sup>347</sup> Examination of the approach adopted in some of the modern treaties is therefore necessary to possibly draw from them for a broader application. It is worthy of note that these treaties do not necessarily present binding principles in a broader context of Aboriginal title. They are specifically negotiated instruments that are meant to address specific issues concerning the parties and the circumstances surrounding the agreement. That said, these approaches are examined only to deduce principles which may be persuasive to the courts for the determination of compensation where Aboriginal title is infringed.

One of the attempts that have been made to further the objective of reconciliation between the Crown and Aboriginal peoples and to foster a positive long-term relationship between Aboriginal and non-Aboriginal communities is the making of modern treaties.<sup>348</sup> These treaties tend to balance the interests of the Crown, Aboriginal peoples and non-Aboriginal peoples, which is the

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<sup>345</sup> *Ibid* at para 69. The Tribunal relied on *Guerin*, *supra* note 123 at 362, *Blueberry River Indian Band*, *supra* note 272 at para 103.

<sup>346</sup> *Ibid* at para 71.

<sup>347</sup> *Adkins et al*, *supra* note 10 at 365.

<sup>348</sup> *Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 S.C.R. 103 at para 10.

“fundamental objective of the modern law of [A]boriginal and treaty rights.”<sup>349</sup> Section 35 of the *Constitution Act* has been held to provide a constitutional basis for further negotiations and perhaps further treaties between the Crown and Aboriginal peoples.<sup>350</sup> The SCC *per* Lamer CJ held that “the Crown is under a moral, if not a legal duty to enter into and conduct those negotiations in good faith.”<sup>351</sup>

Some scholars submit that compensation frameworks in modern land claim agreements give a clue on how to assess Aboriginal perspectives.<sup>352</sup> Perhaps, this is because these agreements were negotiated for years between the Crown and Aboriginal groups.<sup>353</sup> Accordingly, it is pertinent to examine the compensation frameworks expounded in some of these agreements.

The *Maa-Nulth First Nations Final Agreement*<sup>354</sup> is the first multi-nation treaty under the British Columbia Treaty Commission process between the governments of Canada, British Columbia, and the five Maa-Nulth First Nations.<sup>355</sup> The Agreement acknowledges that where it is reasonable to use other means, expropriation of Maa-nulth First Nation Lands should be avoided.<sup>356</sup> However, any interest in Maa-nulth First Nation Lands may be expropriated pursuant to a provincial legislation with the consent of the Lieutenant Governor-in-Council.<sup>357</sup>

The Agreement makes a copious provision as regards the factors to be considered for the total value of compensation upon expropriation of their land. The Agreement provides as follows:

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<sup>349</sup> McCabe, *supra* note 175 at 85. See also *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388 at para 1.

<sup>350</sup> Sparrow, *supra* note 251 at 1105.

<sup>351</sup> Delgamuukw, *supra* note 2 at para 186.

<sup>352</sup> Adkins *et al*, *supra* note 10 at 365.

<sup>353</sup> *Ibid* at 365.

<sup>354</sup> *Maa-Nulth First Nations Final Agreement*, 9 April 2009 (entered into force 1 April 2011).

<sup>355</sup> Indigenous and Northern Affairs Canada, “Maa-nulth First Nations Final Agreement Implementation: Report 2013–2014” online: < <https://www.aadnc-aandc.gc.ca/eng/1494511760118/1494511856157> >. The five Maa-nulth First Nations are Huu-ay-aht First Nations, Ka:’yu:’k’t’h’/Che: k’tles7et’h’ First Nations, Toquaht Nation, Uchucklesaht Tribe, and Yuułu?ił?ath.

<sup>356</sup> *Maa-Nulth First Nations Final Agreement*, *supra* note 354 at s 2.11.1.

<sup>357</sup> *Ibid* at 2.11.1.

The total value of compensation for an Interest in Maa-nulth First Nation Lands expropriated by a Federal Expropriating Authority in accordance with this Chapter will be determined by taking into account the following factors:

- a. the fair market value of the expropriated Interest or of the Maa-nulth First Nation Lands in which an Interest has been expropriated;
- b. the replacement value of any improvement to the Maa-nulth First Nation Lands in which an Interest has been expropriated;
- c. any expenses or losses resulting from the disturbance directly attributable to the expropriation;
- d. any reduction in the value of any Interest in Maa-nulth First Nation Lands that is not expropriated which directly relates to the expropriation;
- e. any adverse effect on any cultural or other special value of Maa-nulth First Nation Lands in which an Interest has been expropriated to the applicable Maa-nulth First Nation, provided that the cultural or other special value is only applied to an Interest in Maa-nulth First Nation Lands recognized in law and held by that Maa-nulth First Nation, and provided that there will be no increase in the total value of compensation on account of any Aboriginal rights, title or interest; and
- f. the value of any special economic advantage arising out of or incidental to the occupation or use of Maa-nulth First Nation Lands to the extent that the value is not otherwise compensated.<sup>358</sup>

Although different in wording, the *Labrador Inuit Land Claims Agreement*,<sup>359</sup> *Westbank First Nation Self-Government Agreement*,<sup>360</sup> *Sioux Valley Dakota Nation Governance Agreement and Tripartite Governance Agreement*,<sup>361</sup> and some other modern treaties adopt a similar approach for the determination of compensation in cases of future expropriation.<sup>362</sup>

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<sup>358</sup> *Maa-Nulth First Nations Final Agreement*, *supra* note 354 at s 2.12.11.

<sup>359</sup> *Land Claims Agreement Between the Inuit of Labrador, Her Majesty the Queen in Right of Newfoundland and Labrador and Her Majesty the Queen in Right of Canada*, 22 January 2005 (entered into force 1 December 2005) [*Labrador Inuit Land Claims Agreement*].

<sup>360</sup> *Westbank First Nation Self-Government Agreement*, 3 October, 2003 (entered into force 1 April 2005).

<sup>361</sup> *Sioux Valley Dakota Nation Governance Agreement and Tripartite Governance Agreement*, 30 August 2013 (entered into force 30 August 2013). [*Sioux Valley Dakota Nation Governance Agreement*].

<sup>362</sup> *Labrador Inuit Land Claims Agreement*, *supra* note 359 at s 4.18.7; *Westbank First Nation Self-Government Agreement*, *supra* note 342 at s120; *Sioux Valley Dakota Nation Governance Agreement*, *supra* note 343 at s. 43.04.

The factors to inform compensation as set out in the *Maa-Nulth First Nations Final Agreement* seem to “attempt” the balanced approach envisaged in *R. v. Van der Peet*.<sup>363</sup> In that case, it was held that “[A]boriginal right must, if it is truly to reconcile the prior occupation of Canadian territory by [A]boriginal peoples with the assertion of Crown sovereignty over that territory, take into account the [A]boriginal perspective, yet do so in terms which are cognizable to the non-[A]boriginal legal system.” The approach largely adopts the usual expropriation principles for the determination of compensation, and at the same time, it takes into cognizance that Aboriginal title has cultural, economic or other special values.

Even though the approach takes into consideration the cultural or other special values that the First Nation may have on their land, the agreement seems to take away with the left hand that which it gives with the right by adding a proviso. The first limb of the proviso says; “...provided that the cultural or other special value is only applied to an Interest in Maa-nulth First Nation Lands recognized in law and held by that Maa-nulth First Nation...”<sup>364</sup> The intended meaning of this proviso is with respect confusing. However, it places an onerous obligation on First Nation to prove that the *special culture or value* on their lands has been recognized in law. It is also not clear what the Agreement might mean by “recognized.” Does it imply that such special interest must have been recognized specifically as opposed to the general recognition given by the Section 35 of the Constitution Act? The second limb of the proviso gives another limitation. It reads as follows; “...and provided that there will be no increase in the total value of compensation on account of any Aboriginal rights, title or interest...”<sup>365</sup> This raises the question: if the consideration of the special cultural or other interests does not affect the total value of compensation, why is it considered in the first place?

Also, under the Agreement, the value of special economic advantage arising (or incidental) to the occupation or use of Maa-nulth First Nation Lands is one of the factors to be considered.<sup>366</sup> This

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<sup>363</sup> *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para 49.

<sup>364</sup> *Maa-Nulth First Nations Final Agreement*, *supra* note 354 at s 2.12.11 (e).

<sup>365</sup> *Ibid* at s 2.12.11 (e).

<sup>366</sup> *Ibid* at s 2.12.11 (f).

provision also comes with the proviso that the value of the said special economic advantage is not to be compensated.

The *Maa-Nulth First Nations Final Agreement's* approach to compensation may not be the best standard to draw from for adoption in a broader context in Canada. This is because the approach in that Agreement may not be able “to attempt” to capture the *actual loss* of an Aboriginal group upon an infringement which seems to be the primary goal for compensation when fiduciary principles are applied as has been submitted earlier in this work. Also, the approach adopted in that Agreement appears not to portray the kind of balance envisaged in *Van der Peet* where equal weight is to be placed both for the interests of the Crown and that of the Aboriginal group.<sup>367</sup> Perhaps, there may be no certain framework for the assessment of an intangible interest like the cultural, religious or spiritual connection to the land; but it should not be considered just for the purpose of mere “consideration” and left “not remedied.”

Of course, *Maa-Nulth First Nations Final Agreement* is a specifically negotiated agreement that portrays the intentions of the parties in the particular circumstances surrounding the agreement. Thus, this agreement may be a good standard for the purpose in which it is made in the first place. However, the approach adopted in that agreement may not be an ideal approach in a broader context.

The *Labrador Inuit Land Claims Agreement* may be said to have a similar but a more acceptable approach when compared with *Maa-Nulth First Nations Final Agreement* because it does not contain provisos. The Agreement provides as follows: “An Arbitration Panel shall consider the following matters when making an award in respect of a Dispute referred to in section 4.18.6: any particular or special value to Inuit of the Expropriated land.”<sup>368</sup> This is akin to the consideration of the *particular nature* of the land that has been examined earlier in this Chapter. Of course, this does not in any way exclude the fact that the Crown has a constant and consistent fiduciary obligation to Aboriginal groups. Perhaps, the approach adopted in the *Labrador Inuit Land Claims Agreement* may be more consistent with the duty of honour and good faith of the Crown.

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<sup>367</sup> *Van der Peet*, *supra* note 363 at para 50.

<sup>368</sup> *Labrador Inuit Land Claims Agreement*, *supra* note 359 at s 4.18.7 (g) (Emphasis Added).

Also, in *Labrador Inuit Land Claims Agreement* and some other modern treaties like the *Inuvialuit Final Agreement*<sup>369</sup> monetary compensation is of the final resort where suitable alternative lands considered to be satisfactory in place of the expropriated land cannot be provided.<sup>370</sup>

Obviously, not all modern treaties provide an indication of the best approach for the determination of compensation in a broader context in Canada. The agreements that may be said to have a more balanced approach leave much to be desired with respect to the method for the calculation of compensation intangible special interests are considered.

## **2.7 Expropriation Act**

The *Expropriation Act* applies to cases of expropriation that are unrelated to Aboriginal and Treaty rights.<sup>371</sup> Thus, the principles for the determination of compensation for expropriation under this Act are not legally binding to cases of infringement of Aboriginal title in Canada. However, there are two principal reasons why it is pertinent to examine the principles enshrined in the Act for the determination of compensation for privately owned properties. First is that in *Tsilhqot'in Nation* the SCC held that “the usual remedies that lie for breach of interests in land are available [to infringement of Aboriginal title], adapted as may be necessary to reflect the special nature of Aboriginal title and the fiduciary obligation owed by the Crown to the holders of Aboriginal title.”<sup>372</sup> This implies that the SCC envisages the possible application of general property law principles (expropriation law principles inclusive) in the determination of the choice and quantum of remedies where Aboriginal title is infringed (monetary compensation inclusive). This approach will be adopted only if it is done with adaptations as may be necessary to suit the *sui generis* nature of Aboriginal title.

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<sup>369</sup> *Inuvialuit Final Agreement*, 18 August 1979 (Entered into force 25 July 1984).

<sup>370</sup> Adkins and others, *supra* note 10 at 365. See also *Labrador Inuit Land Claims Agreement*, *supra* note 360 at s 4.18.5 and *Inuvialuit Final Agreement*, *supra* note 369 at s 7(51).

<sup>371</sup> Aboriginal title is constitutionally protected. Thus, Aboriginal title is protected from legislative interference except through justifiable infringement which was examined briefly in the third part of chapter one. For this see Kent McNeil, “Aboriginal Title as a Constitutionally Protected Property Right” in Owen Lippert ed, *Beyond the Nass Valley: National Implications of the Supreme Court’s Delgamuukw Decision* (Vancouver: The Fraser Institute, 2000) 55. See also *Tsilhqot'in Nation*, *supra* note 6 at para 72.

<sup>372</sup> *Tsilhqot'in Nation*, *supra* note 6 at para 90.

Second, it appears that expropriation law principles are gradually being adopted in some instruments for the determination of compensation for breach of indigenous land rights. Some of these can be found in different modern treaties and Acts that affect Aboriginal land rights.<sup>373</sup>

Further to the above, it is expedient to examine the principles of expropriation law for the determination of compensation where private land rights are expropriated. My examination will first show that the undiluted approach for the determination of compensation under the Act is not suitable for determination of compensation for infringement of Aboriginal title. Subsequently, I will demonstrate how the principles under the act may be adapted to suit the *sui generis* nature of Aboriginal title. This may be persuasive to the courts where issues of compensation for infringement of Aboriginal title cases arise.

One of the primary aims of expropriation law is to compensate private parties when their property is forcibly taken.<sup>374</sup> Although the principle for the determination of compensation developed under the expropriation law may be difficult to be applied in cases of expropriation of Aboriginal title, such principles may serve as a reference point to consider compensation where Aboriginal title is justifiably infringed.<sup>375</sup> This approach is validated by *Tsilhqot'in Nation* where it was held that comparisons to other types of land ownership (e.g., fee simple) might be useful in the understanding of aspects of Aboriginal title.<sup>376</sup> However, the essence of the comparisons with the approaches used in other forms of land holding is just to draw analogies and not as a means of equating the principles applicable to other forms of land holdings to that of Aboriginal title.<sup>377</sup>

The focal point for the determination of compensation upon expropriation of interest in land in Canada pursuant to the *Expropriation Act* is the *market value* of the property.<sup>378</sup> *Market value* is defined as "...the amount that would have been paid for the interest or right if, at the time of it

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<sup>373</sup> For instance see *Inuvialuit Final Agreement*, *supra* note 369 at para 7 (53); *Métis Settlement Act*, RSA 2000, c M-14 (MSA) at s 113 (c) and *First Nation Land Management Act*, SC 1999, c 24 (FNLMA) as s 31 (3).

<sup>374</sup> *Mainville*, *supra* note 19 at 105. See also *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*, [1997] 1 S.C.R. 32.

<sup>375</sup> *Ibid* at 106.

<sup>376</sup> *Tsilhqot'in Nation*, *supra* note 6 at para 72.

<sup>377</sup> *Ibid* at para 72.

<sup>378</sup> *Expropriation Act*, RSC 1985 at s 26 (2).

taking, it had been sold in an open market by a willing seller to a willing buyer.”<sup>379</sup> This definition presupposes that the land should be of such that is sellable in an open market by any willing buyer.

Whether or not the *market value* principle is ideal for the valuation of compensation with respect to the expropriation of Aboriginal title may largely depend on the definition of *market value*. In the *Expropriation Act*, *market value* is defined with reference to the amount a willing seller might be willing to pay for such property in the open market. Before I even delve into what might be the difficulty in the evaluation of the market value of Aboriginal title, the obvious challenge of applying the *market value* principle as per *Expropriation Act* to Aboriginal title is that it comes with restrictions.<sup>380</sup> First, it is collectively held not only for the present generation but the future generation of a particular Aboriginal group, and also it cannot be alienated except to the Crown.<sup>381</sup> This restriction makes Aboriginal title not to be available in the open market to a willing buyer, and consequently, there will be a difficulty in the application of *market value* in an open market as envisaged in the *Expropriation Act*.

Assuming in “practical terms” and “for the sole purpose of determining compensation” Aboriginal title is *deemed* to be sellable in an open market; the next challenge will be how to determine the market value of Aboriginal title considering that the restrictions on Aboriginal title may ordinarily affect its value. Whether the restrictions make Aboriginal title of more value when compared to a fee simple or of less value is not clear. It has been argued that since Aboriginal title is subject to “material impediments” (perhaps restrictions), the amount of compensation payable upon infringement must be much less than the current value of the land in “purely economic and modern usage and terms.”<sup>382</sup> This appears to be the possible implication of the decision of Gonthier, Major, Binnie and LeBel JJ in *Musqueam Indian Band* earlier considered in this chapter.

A counter-argument will be that the restrictions placed on Aboriginal title show how special it is and thus increase its value. Aboriginal title may be said to be everything fee simple is when viewed in the perspective of usage (even modern usage). By virtue of *Tsilhqot’in Nation* “Aboriginal title

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<sup>379</sup> *Ibid* at s 26 (2).

<sup>380</sup> *Tsilhqot’in Nation*, *supra* note 6 at para 74.

<sup>381</sup> *Ibid* at para 74.

<sup>382</sup> Isaac, *Aboriginal Title*, *supra* note 93 at 47-48.



confers ownership rights similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land.”<sup>383</sup> The argument that the inalienability of Aboriginal title except to the Crown makes it of less *market value* in “practical terms” when compared to fee simple may not be correct. On the contrary, the restriction of Aboriginal title could be argued to increase its value. This is because Aboriginal title’s inalienability except to the Crown only emphasizes the Crown’s radical title in the land subject to Aboriginal title. This radical title gives birth to a fiduciary duty on the part of the Crown, which is consequentially a right which is of value to Aboriginal groups.<sup>384</sup>

Another “material impediment” that is argued (albeit erroneously) to make Aboriginal title to be much less than the current value of the land in “purely economic and modern usage and terms” is the extent to which it can be used.<sup>385</sup> On the contrary, Aboriginal title holders of modern times can use their lands in modern ways (including non-traditional uses), just like fee simple provided that such uses are not incompatible with the communal and nature of the groups’ attachment to the land.<sup>386</sup> Thus, in “purely economic terms” Aboriginal title may not be subject to such “material impediments” as presupposed by some scholars.

Having examined the plausible challenges that will arise upon application of the *market value* principle as defined by the *Expropriation Act*, it is safe to conclude that the usual principles of compensation as in expropriation law is inadequate to address the issues that will arise upon the infringement of Aboriginal title.<sup>387</sup> This position is confirmed in *Delgamuukw* where it was held that fair compensation in the context of expropriation of Aboriginal title is not to be equated with the price of a fee simple.<sup>388</sup>

What then can be drawn from the *market value* principle of expropriation law? The *market value* principle may not be totally useless in Aboriginal title context if the definition of *market value*

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<sup>383</sup> *Tsilhqot’in Nation*, *supra* note 6 at para 73.

<sup>384</sup> *Ibid* at para 69.

<sup>385</sup> Isaac, *Aboriginal Title*, *supra* note 93 at 47.

<sup>386</sup> *Tsilhqot’in Nation*, *supra* note 6 at para 67 & 75.

<sup>387</sup> Mainville, *supra* note 19 at 106.

<sup>388</sup> *Delgamuukw*, *supra* note 2 at para 203.

adapts to the peculiarities of Aboriginal title. For instance, the real *market value* of Aboriginal title could be said to be the best use the Crown in fulfilling her fiduciary obligation could have put a land subject to Aboriginal title assuming if it is surrendered by the group involved. This is because the Crown is the only channel by which an Aboriginal title can get to any market and the Crown is ordinarily placed with the obligation to get the best deals available for the Aboriginal group. Hence, this may be a unique principle that is a product of the synergy between the application of expropriation law principles and fiduciary principles. This makes a lot of sense because Aboriginal title gives an Aboriginal group rights akin to that of a fee simple (in terms of use) plus rights based on the fiduciary obligation of the Crown. Consequently, the expropriation of interest in Aboriginal title should ordinarily combine the principles of expropriation law applicable to fee simple in combination with the fiduciary principles in order to uphold the honour and good faith of the Crown.

Furthermore, the *Expropriation Act* mandates the Minister to make an offer of compensation to the private person (s) whose interest in land is expropriated within 90 days of approval of the expropriation.<sup>389</sup> This presupposes that compensation is not supposed to be unilaterally decided. Where the Minister and the person entitled to compensation are unable to agree the amount of compensation, either the Minister or the person is to within 60 days serve the other a notice to negotiate a settlement of compensation.<sup>390</sup> A negotiator may be appointed, whose duty will be amongst others to inspect the land, receive and consider any appraisal, oral evidence, etc.<sup>391</sup> One of the principal reasons for negotiation is to take into consideration the perspectives of the person (s) sought to be compensated as regards the value of their interest in land. It is only fair to give the person an opportunity to be heard, and to double check, the offer made by the Minister and further evaluation of the particular nature of the land sought to be expropriated. Another important factor to be observed in the foregoing provision of the *Expropriation Act* is the timelines given for series of events as regards valuation of compensation. These kinds of timelines become tenable where a legislative framework regulates a particular set of activities.

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<sup>389</sup> *Expropriation Act*, *supra* note 378 at s 16.

<sup>390</sup> *Ibid* at s 30.

<sup>391</sup> *Ibid* at s 30 (4).

The negotiation style and the timelines therein is worthy of emulation in the context of Aboriginal title where the Crown intends to justifiably infringe an interest of an Aboriginal group to their land. However, one would only expect that the choice of negotiator (s) in this context should take into consideration the appointment of a person who is versed in the knowledge of the nature of the particular Aboriginal title which is sought to be expropriated.

Further to the above, developing a legislative scheme (for the purpose of compensation) that will take into cognizance of the nature of Aboriginal title upon expropriation may be desirable.<sup>392</sup> An insight into what this might look like can be seen in the context of *Métis Settlement Act*<sup>393</sup> and *First Nation Land Management Act*.<sup>394</sup>

## **2.8 Métis Settlement Act (MSA)**

The *MSA* is one of the modern statutory regimes for the protection of Métis rights in Alberta.<sup>395</sup> The primary purpose of the Act is to “enhance Métis identity, culture, and self-governance by creating a land base for Métis.”<sup>396</sup> Further to the purpose of *MSA*, it makes provisions as regards the procedure by which surface access may be provided to existing mineral leaseholders and some operators to carry out projects in oil and gas, electricity and mining.<sup>397</sup> The Act gives the occupants of land required for an authorized project or existing mineral lease the right for their interest to be considered and to be given fair compensation and interest as a result of use, entry or damage to their land.<sup>398</sup> Where a right of entry order is made in favor of an operator, the Land Access Panel or the Existing Leases Access Panel<sup>399</sup> has a mandatory duty to inform the occupants of the land of the date, place and time for the valuation of compensation and identification of the person (s)

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<sup>392</sup> Adkins *et al*, *supra* note 10 at 380.

<sup>393</sup> *Métis Settlement Act*, RSA 2000, c M-14 (*MSA*).

<sup>394</sup> *First Nation Land Management Act*, SC 1999, c 24 (*FNLMA*).

<sup>395</sup> Adkins *et al*, *supra* note 10 at 367.

<sup>396</sup> *Ibid* at 367. See also *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham* [2011] 2 S.C.R. 670 at para 3.

<sup>397</sup> *Ibid* at 367. See also *MSA*, *supra* note 393 at s 113.

<sup>398</sup> *MSA*, *supra* note 393 at s 113 (c).

<sup>399</sup> These bodies established by sections 186 and 187 of *MSA* respectively for the purpose of enhancing Metis culture and identity and furthering the attainment of self-governance by Metis settlements under the laws of Alberta and the settlement of disputes arising under the Act.

who will receive the compensation.<sup>400</sup> In the determination of compensation, the Land Access Panel or the Existing Leases Access Panel may consider the following:

the value of the parcel of land affected, including (i) the cultural value for preserving a traditional Metis way of life, (ii) the economic value as an asset, and (iii) the productive value; (b) damage in the specific existing mineral lease or authorized project area, including (i) the effect of the lease or project on the present and planned use of the parcel and surrounding area, (ii) the special damages to improvements, crops, wildlife, livestock, trap lines and natural vegetation resulting from the lease or project, and (iii) the amount of the lease or project area that the existing mineral leaseholder or operator may damage; (c) the impact of the lease or project on other areas, including (i) disturbance to the physical, social and cultural environment, (ii) location of the lease or project in relation to existing or planned community uses, and (iii) other specific matters, such as the cumulative effect of related projects.<sup>401</sup>

The above provision gives an extensive range of factors that should be considered before arriving at the value of the land putting the nature of the land in question into consideration. This Act may be said to adopt the *market value* principle as in *Expropriation Act* to suit the context of Métis patented land. One cannot be said to arrive at the real value (or perhaps fair value) of the land without at least considering the physical, social, cultural, traditional and religious value of the land.

*MSA* does not extend to explaining how the cultural value of land can be valued. But one would imply that it may vary depending on the particular nature of the land which may be deduced from the representations made by the occupants. There may be no monetary compensation that will absolutely satisfy the occupants. The whole essence of compensation in this instance is to place the occupants in a position (as far as money can go) they would have been had the surface order not been made.

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<sup>400</sup> *MSA*, *supra* note 393 at s 117 (c).

<sup>401</sup> *Ibid* at s 118 (emphasis added).

The procedure adopted in *MSA* (of course with developments) is worthy of emulation in the development of a formal legislative regime in the whole of Canada that should address amongst other things the valuation of compensation in upon infringement of Aboriginal title in Canada.

## **2.9 First Nation Land Management Act (FNLMA)**

*FNLMA* is an Act that ratified the *Framework Agreement on First Nation Land Management* between the Crown and a specified group of First Nations in relation to their land.<sup>402</sup> *FNLMA* provides for factors similar to that of *MSA* in the event of expropriation of the First Nation interest in their land as follows:

- (a) the market value of the expropriated interest or right or of the land in which an interest or right has been expropriated; (b) the replacement value of any improvement to the land; (c) any expenses or losses resulting from a disturbance attributable to the expropriation; (d) any reduction in the value of any interest or right in First Nation land that is not expropriated; (e) any adverse effect on any cultural or other special value of the land to the First Nation; and (f) the value of any special economic advantage arising out of or incidental to the occupation or use of the land to the extent that that value is not otherwise compensated.<sup>403</sup>

*FNLMA* further provides that where there is any conflict between the *Expropriation Act* and *FNLMA*, the latter shall prevail to the extent of the inconsistency.<sup>404</sup>

The *MSA* and *FNLMA* are obviously not legally applicable to the broader context of Aboriginal title; however, they may be said to give an insight as regards a workable approach for balancing the interests of the Crown, Aboriginal peoples and other societal interests in the valuation of compensation.<sup>405</sup>

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<sup>402</sup> *Framework Agreement on First Nation Land Management*, 12 February 1996 (Entered into force on 17 June 1999).

<sup>403</sup> *FNLMA*, *supra* note 394 at s 31 (3).

<sup>404</sup> *Ibid* at s 33.

<sup>405</sup> This does not necessarily mean that the approaches in *MSA* and *FNLMA* are the most appropriate approaches. What in my view may be the most appropriate approach to the determination of compensation for infringement of Aboriginal title will be examined in chapter four of this work.

## 2.10 Conclusion

What can be made out of the above analysis? The above analysis shows that Canada has principles for the determination of compensation with respect to infringements of Aboriginal title, deducible from several sources. Some of the legal sources discussed in this chapter are obviously not directly applicable to infringements of Aboriginal title. However, the principles deducible from them may be persuasive to courts in the determination of compensation.

The current binding approach may not be sustainable as it is quite undeveloped.<sup>406</sup> Undoubtedly, developing a certain balanced approach for the determination of compensation, which will take into contemplation the interests of the Aboriginal group affected, the radical title of the Crown and its fiduciary obligations and the broader interest of the society may not be an easy task. However, it is desirable that some form of certainty is attained in this area.

Further to the above, the next Chapter will discuss the approach adopted in other jurisdictions and under international law, before making recommendations as regards the way forward in Canada.

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<sup>406</sup> Adkins *et al*, *supra* note 10 at 380.

## CHAPTER THREE: A SURVEY OF THE PRINCIPLES FOR THE DETERMINATION OF COMPENSATION FOR INFRINGEMENTS OF INDIGENOUS LAND RIGHTS AND INTERESTS IN OTHER JURISDICTIONS AND THE INTERNATIONAL ARENA.

### 3.1 Introduction

This chapter explores the principles for the determination of compensation for infringements of the land rights and interests of indigenous peoples in Australia, Malaysia and under the *United Nations Declaration on the Rights of Indigenous Peoples, 2007 (UNDRIP)*. The previous chapter shows that although compensation regime for infringements on Aboriginal title in Canada centers on fiduciary principles, there are variations in the different sources examined. Thus, the essence of this chapter is to evaluate the situations in other similar jurisdictions to draw from their experiences for possible implementation in Canada.

The choice of Australia and Malaysia stems from the similarities between the nature of indigenous land rights and interests in those states with Aboriginal title in Canada.<sup>407</sup> A study of the jurisprudence on native rights in Australia shows that a number of the principles developed by Australian courts in that regard were drawn from the experience in Canada and vice versa.<sup>408</sup> Hence exchange of principles on the rights of indigenous peoples between Australia and Canada has long been in existence. Apart from the similarities between the two systems, Australia has a legislative framework that established detailed principles for the determination of compensation for acts of the Crown which affect the rights and interests of an indigenous group in their lands.<sup>409</sup> The purport of those principles has also been subjected to judicial scrutiny and interpretation. This part examines both the legal framework on compensation for acts that affect native title in Australia and the judicial authorities that interpret the relevant provisions of the enactment.

Likewise, the development of native title in Malaysia was largely influenced by the concept of Aboriginal title in Canada and native title in Australia. The proposals to be made in this research

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<sup>407</sup> The nature of indigenous land rights in these jurisdictions which will be examined subsequently in this chapter shows the similarities they have with Aboriginal title in Canada.

<sup>408</sup> For this see *Mabo & Ors. v. Queensland (No. 2)* (1992) 175 CRL 1. This case recognized the concept of native title in Australia before emergence of *Native Title Act 1993 (Cth) (NTA)*. The High Court of Australia in the elucidation of the scope and content of native title in Australia drew from the already the Supreme Court of Canada's (SCC) decision in *Calder v. British Columbia (AG)* [1973] S.C.R. 313

<sup>409</sup> *Native Title Act 1993 (Cth) (NTA)*.

to both policymakers and the courts for the development of the existing legal regime on compensation for infringements of Aboriginal title are drawn from these jurisdictions

The preliminary research before limiting the comparison to Australia and Malaysia explored other jurisdictions like New Zealand, the United States of America, South Africa, Kenya, and Nigeria. I found the framework in Australia and Malaysia more helpful as some of the principles applied in their compensation regime for infringement of indigenous land rights answer some of the complex questions about the determination of compensation in the context of my contentions more than other jurisdictions.<sup>410</sup>

Finally, the ongoing debate on the propriety or otherwise of the full implementation of *UNDRIP* in Canada has motivated the examination of the provisions of the Declaration that bear on the redress for violation of land rights. This chapter finds that the full implementation of *UNDRIP* will not automatically bridge the gap in the compensation regime concerning Aboriginal title in Canada. However, principles may be drawn from the content and character of *UNDRIP* for the development of a mechanism for the determination of appropriate compensation that is due to an indigenous group whose Aboriginal title has been infringed in Canada.

## **3.2 The Experience in Australia**

### **3.2.1 Native Title in Australia (An Overview)**

The legal concept of native title which gives indigenous peoples of Australia rights and interests to their land was recognized in 1992 in the case of *Mabo & Ors. v. Queensland (No. 2)*.<sup>411</sup> In *Mabo*, the High Court of Australia<sup>412</sup> held that the common law recognizes a native title which gives the indigenous inhabitants entitlements to their traditional lands in accordance with their laws and customs (in cases where such rights or interests have not been extinguished).<sup>413</sup> The nature of native title was described by the court to be *sui generis* just like the Aboriginal title of Canada.<sup>414</sup> The content and origin of the native title come from the traditional laws and customs acknowledged

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<sup>410</sup> More so, this thesis has a limited scope that may not give room to extend the research to other jurisdictions. This informed the limitation of the research to the most helpful jurisdictions in the context of the issues raised herein.

<sup>411</sup> (1992) 175 CRL 1.

<sup>412</sup> The High Court of Australia is the supreme court in Australia and the final court of appeal.

<sup>413</sup> *Mabo*, *supra* note 408 at para 2.

<sup>414</sup> *Ibid* at paras 22 & 25.



and observed by indigenous groups who inhabit a territory.<sup>415</sup> Thus, the connection of indigenous peoples of Australia with their land in accordance with their customs and tradition is the source of the native title.<sup>416</sup>

While the interest of an indigenous group or clan in their land is recognized and protected, the Crown has a radical or underlying title in the native land.<sup>417</sup> Consequently, native title is inalienable to persons that are not members of an indigenous group.<sup>418</sup> However, such indigenous interest in land can voluntarily be surrendered (to the Crown) or extinguished by the Crown. In such a circumstance, the Crown becomes the absolute beneficial owner.<sup>419</sup>

Following the recognition of native title in *Mabo*; native title in Australia was given a legislative recognition in *Native Title Act (NTA)*.<sup>420</sup> The main objects of the *NTA* are:

- a) to provide for the recognition and protection of native title
- b) to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings
- c) to establish a mechanism for determining claims to native title
- d) to provide for, or permit, the validation of past acts, and intermediate period acts, invalidated because of the existence of native title.<sup>421</sup>

The implication of the *NTA* was encapsulated in *Western Australia v Commonwealth (Native Title Case)*<sup>422</sup> where the High Court of Australia held that *NTA* eliminates the common law defeasibility of native title and protects the indigenous peoples' enjoyment of their lands.<sup>423</sup> The protection of native title under the *NTA* was however held to be subject to three exceptions: "the occurrence of a past act that has been validated [by *NTA*], an agreement on the part of the native title holders, or the doing of a permissible future act."<sup>424</sup> *NTA* validates certain acts that took place before 1 January

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<sup>415</sup> *Ibid* at para 64.

<sup>416</sup> Lisa Strelein, *Compromised Jurisprudence: Native title Cases since Mabo*, 2<sup>nd</sup> ed (Acton: Aboriginal Studies Press, 2009) at 11.

<sup>417</sup> *Mabo*, *supra* note 408 at para 51.

<sup>418</sup> *Ibid* at para 83.

<sup>419</sup> *Ibid* at 83.

<sup>420</sup> *Native Title Act 1993* (Cth) (*NTA*).

<sup>421</sup> *Ibid* at s 3.

<sup>422</sup> *Western Australia v Commonwealth (Native Title Case)* (1995) 183 CLR 373.

<sup>423</sup> *Ibid* at para 93.

<sup>424</sup> *Ibid* at para 93.

1994 (past acts) which would have ordinarily been invalid because of native title.<sup>425</sup> Notwithstanding the validation of these past acts, the *NTA* gives the indigenous group affected the right to compensation for those acts.<sup>426</sup> Native title can also be validly extinguished by surrender or through future compulsory acquisition.<sup>427</sup> These acts are also subject to compensation.<sup>428</sup>

Further to the above, it is apparent that the native title in Australia shares some similarities with Aboriginal title in Canada. This shows why the High Court of Australia drew from the decision of the Supreme Court of Canada (SCC) in *Calder v. Attorney-General of British Columbia* in the recognition of the concept of native title.<sup>429</sup> Similarly, the SCC relied on the decision of *Mabo* in the clarification of the scope and content of Aboriginal title in *Delgamuukw v. British Columbia*.<sup>430</sup> Some of the obvious similarities between native title in Australia and Aboriginal title in Canada are as follows:

1. The nature of both Aboriginal title and native title are *sui generis* or unique, distinct from fee simple.<sup>431</sup>
2. The indigenous peoples have a substantial connection to their lands.<sup>432</sup>
3. Aboriginal title and native title are inalienable except to the Crown.<sup>433</sup>
4. Both interests in land are compensable rights.<sup>434</sup>

The two forms of interest in land also have dissimilarities. These differences may be the reason for the doubts expressed by the High Court of Australia in *Fejo v Northern Territory*<sup>435</sup> about the relevance of decisions of other common law decisions (like Canada) where questions about native title arise.<sup>436</sup>

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<sup>425</sup> *NTA*, *supra* note 420 at s 13A.

<sup>426</sup> *Ibid* at s 17 & 20.

<sup>427</sup> *Ibid* at s 24MD (2) & (2A).

<sup>428</sup> *Ibid* at s 24AA (6).

<sup>429</sup> *Mabo*, *supra* note 408 at para 75.

<sup>430</sup> *Delgamuukw*, *supra* note 2 at para 153. The SCC held as follows: “In *Mabo*, *supra*, the High Court of Australia set down the requirement that there must be “substantial maintenance of the connection” between the people and the land. In my view, this test should be equally applicable to proof of title in Canada.”

<sup>431</sup> *Mabo*, *supra* note 408 at para 22 & 25. See also *Delgamuukw*, *supra* note 2 at para 111.

<sup>432</sup> *Ibid* at para 153.

<sup>433</sup> *Ibid* at para 83. See also *Delgamuukw*, *supra* note 2 at para 113.

<sup>434</sup> *Ibid* at para 12. See also *Delgamuukw*, *supra* note 2 at para 203.

<sup>435</sup> *Fejo v Northern Territory* [1998] 195 CLR 96.

<sup>436</sup> *Ibid* at para 54.

One of the striking differences between the two forms of interest in land is the source. The focal point for the establishment of Aboriginal title is “occupation [of land] before assertion of British sovereignty.”<sup>437</sup> On the other hand, the focus for the establishment of native title is “proof of native law and custom possessed by an indigenous group in connection to land.”<sup>438</sup>

Another variance between the two forms of indigenous land rights is the issue of “extinguishment.” Canadian jurisprudence has established that since Aboriginal rights (including Aboriginal title) is protected constitutionally by Section 35 of the *Constitution Act, 1982*, Aboriginal rights can no longer be extinguished by post-1982 legislation (Section 35 does not revive already extinguished rights).<sup>439</sup> Legislation can validly infringe Aboriginal title only if it passes the two tests of justification: “the legislation must further a “compelling and substantial” purpose and account for the “priority” of the infringed Aboriginal interest under the fiduciary obligation imposed on the Crown.”<sup>440</sup> This position is quite different under the Australian legal regime as *NTA* gives room for future compulsory acquisition of native title which can be achieved without passing through the kind of justification test tenable in Canada.<sup>441</sup>

The rights that native title in Australia confers may also differ from that of Aboriginal title in Canada. Richard H Bartlett argues that while native title in Australia does not amount to full beneficial ownership, Aboriginal title in Canada contemplates full beneficial ownership.<sup>442</sup> He bases his argument on the decision of the High Court of Australia in *Western Australia v Ward*<sup>443</sup> where the court interpreted the provision of the *NTA* on the requirements for proof of native title.<sup>444</sup> The court held that there are two inquiries required by the *NTA*: “in the one case for the rights and interests possessed under traditional laws and customs and, in the other, for connection with land or waters by those laws and customs.”<sup>445</sup> Bartlett argues that based on this decision, “native title

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<sup>437</sup> *Tsilhqot'in Nation*, *supra* note 6 at para 25.

<sup>438</sup> *NTA*, *supra* note 420 at s 223. See also *Mabo*, *supra* note 408 at para 66.

<sup>439</sup> *Sparrow*, *supra* note 251 at 1113-19.

<sup>440</sup> *Tsilhqot'in Nation*, *supra* note 6 at para 13.

<sup>441</sup> *NTA*, *supra* note 420 at s 24MD (2).

<sup>442</sup> Richard H Bartlett, *Native Title in Australia*, 3<sup>rd</sup> ed (Australia: LewisNexis Butterworths, 2015) at 310-313.

<sup>443</sup> *Western Australia v Ward* (2002) 213 CLR 1.

<sup>444</sup> See *NTA*, *supra* note 420 at s 223.

<sup>445</sup> *Ward*, *supra* note 443 at 18.

rights and interests in Australia are limited by traditional laws and customs and cannot amount to full beneficial ownership.”<sup>446</sup>

On the other hand, the position in Canada is that “uses [of Aboriginal title in Canada] are not confined to the uses and customs of pre-sovereignty times; like other landowners, Aboriginal title holders of modern times can use their land in modern ways, if that is their choice.”<sup>447</sup> This is however subject to the restriction that it cannot be developed, used or misused in a way that would prevent the future generation from using and it.<sup>448</sup> Therefore Aboriginal title in Canada allows for full beneficial ownership of Aboriginal title unlike the position in Australia.<sup>449</sup>

One may therefore argue that Aboriginal title in Canada regarding the uses it can be put may be more valuable than native title in Australia. Another view may be that this traditional restriction in Australia may not necessarily affect its value as it is a unique land right and interest, available to only one buyer, which is the Crown. More so, contending that the restriction reduces the value of native title in Australia may be akin to allowing the Crown to benefit from its wrong. The restriction exists precisely because of the Crown’s actions in the first place; the Crown is the only market for native title, and the Crown is also the infringer. I will make arguments along these lines while addressing the possible implications of the restrictions on Aboriginal title in Canada to its value in the next chapter.

In *Griffiths v Northern Territory of Australia*<sup>450</sup> which the next section will examine in detail, the trial court did not treat the restrictions on native title as discounting factors. Rather, while granting compensation for extinguishment of native title, it only considered that the particular claim concerned a *non-exclusive* native title.<sup>451</sup> Native title is *exclusive* where it gives the holders the right to possess the land to the exclusion of every other person. On the other hand, it is *non-exclusive* where it gives the holders a bundle of rights which does not extend to the right to the exclusion of others.<sup>452</sup> On appeal, the Federal Court reassessed the compensation granted by the

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<sup>446</sup> Bartlett, *supra* note 442 at 311.

<sup>447</sup> *Tsilhqot’in Nation*, *supra* note 6 at para 75.

<sup>448</sup> *Ibid* at para 108.

<sup>449</sup> Bartlett, *supra* note 442 at 313.

<sup>450</sup> *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900 at para 197; *Northern Territory of Australia v Griffiths* [2017] FCAFC 106.

<sup>451</sup> *Ibid* at para 197.

<sup>452</sup> See generally; *The Commonwealth v Yarmirr* [2001] HCA 56.

trial court because the trial court did not take into cognizance the limitations on the land rights and interests while assessing compensation.<sup>453</sup>

The trial court and the Federal Court seem to represent the different views on this point. The position of the trial judge however appears to be the better view and takes into consideration the peculiar nature of the native title. The next section will critically examine *Griffiths* and give reasons why the decision of the trial judge may be a better decision.

### **3.2.2 Principles for Determination of Compensation under the NTA**

The *NTA* has detailed provisions as regards the entitlement of indigenous groups to compensation when their interests in the native title are violated.<sup>454</sup> The effect of these provisions is that there is no longer uncertainty in the legal regime of Australia on whether or not native title is a compensable right. Entitlement to compensation under the *NTA* extends to past, intermediate and future acts that affect the native title.<sup>455</sup>

Succinctly, the acts that are compensable under the *NTA* are past and intermediate acts that are validated by the Act or future acts that are in line with the provisions of the Act. Past acts are acts that occurred before 1 July 1993 (if the act is legislation) or before 1 January 1994 (for acts other than legislation) which were inconsistent with native title rights and interests and could have ordinarily been invalid under the *Racial Discrimination Act 1975 (Cth)*.<sup>456</sup> *NTA* validates certain past acts of the Commonwealth and also allows the states and territories to validate certain past acts.<sup>457</sup>

Intermediate acts under section 232A of the *NTA* are acts that took place between 1 January 1994 and 23 December 1996 before the High Court's decision in *Wik Peoples v Queensland* (1996) 187 CLR 1. *NTA* also validates certain intermediate acts of the Commonwealth and allows the states and territories to validate same.<sup>458</sup>

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<sup>453</sup> *Northern Territory of Australia v Griffiths* [2017] FCAFC 106 at para 129 [*Griffiths* 2].

<sup>454</sup> *NTA*, *supra* note 420 at ss 17, 20, 23J, 48, 49, 50, 51, 51A, 52, 52A & 53.

<sup>455</sup> *Ibid* at preamble; s 4 (2) & (3).

<sup>456</sup> *Ibid* at s 228. The *Racial Discrimination Act 1975 (Cth)* protects holders of native title from discriminatory extinguishment or impairment of their land rights and interests.

<sup>457</sup> *Ibid* at 13A. Past acts are grouped into categories A, B, C and D. For this see *NTA*, *supra* note 420 at ss. 229-232.

<sup>458</sup> *Ibid* at s 21.

Finally, for the future acts to be compensable under the *NTA*, it must be a valid future act.<sup>459</sup> Invalid future acts are ordinarily remedied under the general law and not necessarily under the *NTA*.<sup>460</sup> Such remedies may take forms other than compensation: like restitution of land, reallocation of land with the same size and quality, etc. This does not, however, preclude a native group's entitlement to compensation in appropriate circumstances for such invalid acts under the general law.

Although past and intermediate acts that are not or cannot be validated under the *NTA* are not compensable under the Act, they should be ordinarily compensable under the *Racial Discrimination Act*. The *Racial Discrimination Act* protects holders of native title from discriminatory extinguishment or impairment of their land rights and interests.<sup>461</sup> The Act guarantees equality before the law with respect to the provisions of *International Convention on the Elimination of All Forms of Racial Discrimination*.<sup>462</sup> The *NTA* does not preclude entitlement to compensation under the *Racial Discrimination Act*.<sup>463</sup> It only precludes multiple compensations for acts which are essentially the same.<sup>464</sup> Thus, holders of a native title whose rights and interests are infringed cannot be compensated both under the *NTA* and *Racial Discrimination Act*. A claim under the *Racial Discrimination Act* becomes significant where there is no entitlement under the *NTA*.<sup>465</sup>

For an act to be compensable under the *NTA*, it must *affect* the native title, and this may take different forms. An act *affects* native title if it is inconsistent (wholly or partly) with the continued existence, enjoyment or exercise of the native title rights and interests or if it extinguishes those rights and interests.<sup>466</sup> These acts may come in the form of legislation; grant of licences, permits

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<sup>459</sup> *Ibid* at s 50.

<sup>460</sup> *Ibid* at ss. 50 and 213.

<sup>461</sup> Bartlett, *supra* note 442 at 780.

<sup>462</sup> *Ibid* at 780. See also *Racial Discrimination Act 1975 (Cth)* section 10; The Convention on the Elimination of All Forms of Racial Discrimination 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) [CERD].

<sup>463</sup> *Ibid* at 782.

<sup>464</sup> *Ibid* at 782. See also *NTA*, *supra* note 420 at s 49. It is worthy of note that pursuant to section 7 of the *NTA*, provisions of *NTA* are subject to the *Racial Discrimination Act 1975*. However, that provision does not affect the validation of acts under the *NTA*.

<sup>465</sup> *Ibid* at 782.

<sup>466</sup> *NTA*, *supra* note 420 at s 227.

or variation of same; a creation, extinguishment or variation of any interest in land or waters; the exercise of executive power of the Crown; etc.<sup>467</sup>

Division 5 of the *NTA* is dedicated to the principles to be used in the determination of compensation.<sup>468</sup> The standard of compensation in accordance to the *NTA* is that compensation must be on *just terms* and it must cover any loss, diminution, impairment or any other impact on the native title rights and interests.<sup>469</sup> However, the total compensation payable assuming the act totally extinguishes all the native title must not exceed the total amount payable for compulsory acquisition of freehold estate in land or waters.<sup>470</sup> Consequently, where the act does not totally extinguish the native title rights, the amount of compensation payable will not be up to the amount payable for compulsory acquisition of freehold estate in land. Another factor that may limit compensation from getting to the amount payable for compulsory acquisition of a freehold estate is the extent of the interest(s) of the indigenous group affected. The interest (s) of an indigenous group may be *exclusive* or *non-exclusive*.<sup>471</sup> Section 51A (1) of *NTA* (which places a limit to the amount payable) does not expressly reflect that the amount payable reduces to a fraction of the total amount payable for a freehold estate where the compensable act affects a non-exclusive interest. However, this appears to be the approach of the courts in Australia.<sup>472</sup> Perhaps, this comes with a presumption that s 51A (1) envisages that the maximum amount is only payable to exclusive interests.

The best explanation given to what compensation on *just terms* might mean under the *NTA* is that it must cover any loss, diminution, impairment or any other impact on the native title rights and interests.<sup>473</sup> This leaves a clearer explanation to judicial interpretation. What compensation on *just terms* might mean may be seen in the cases of *Griffiths v Northern Territory of Australia (No*

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<sup>467</sup> *Ibid* at s 226 (2).

<sup>468</sup> *Ibid* at ss 48, 49, 50, 51, 51A, 52, 52A & 53.

<sup>469</sup> *Ibid* at s 51 (1).

<sup>470</sup> *Ibid* at s 51A (1).

<sup>471</sup> Native title is *exclusive* where it gives the holders the right to possess the land to the exclusion of every other person. On the other hand, it is *non-exclusive* where it gives the holders a bundle of rights which does not extend to the right to exclusion of others. Such bundle of rights could be rights to possess the land, fish etc. See *The Commonwealth v Yarmirr* [2001] HCA 56.

<sup>472</sup> *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900 at para 197; *Northern Territory of Australia v Griffiths* [2017] FCAFC 106.

<sup>473</sup> *NTA*, *supra* note 420 at s 51 (1).

3)<sup>474</sup> & *Northern Territory of Australia v Griffiths*.<sup>475</sup> The former is a decision of the Federal Court of Australia (FCA), and the latter is the decision of the Full Court (FC) of the FCA acting in its appellate jurisdiction in the same matter. As at the time of writing this thesis, the case is pending before the High Court of Australia.<sup>476</sup>

The compensation claim in *Griffiths* was with respect to the extinguishment of non-exclusive native title rights and interests. The total compensation claim was for 53 acts on 39 lots and four public roads.<sup>477</sup> Based on the peculiar nature of native title, the trial court took a *bifurcated approach* in the determination of compensation. The approach was to determine the compensation payable for the *economic losses* and *non-economic losses* differently, using different principles. The economic losses are tangible losses, while the non-economic losses are intangible losses emanating from the spiritual component and the special connection that the native group has in the land.<sup>478</sup> The *bifurcated approach* used by the trial judge is not a mandatory approach under the *NTA*. It was an approach employed by the parties in their pleadings for convenience. However, the character and content of the *NTA* allow the approach.

#### Compensation for Economic Losses.

The trial court was urged by the Northern Territory (NT) to follow the conventional approach of assessing compensation in expropriation cases as expounded in *Spencer v Commonwealth*.<sup>479</sup> The conventional test expressed in *Spencer* for the determination of compensation is “the value which would be paid by a willing but not anxious purchaser from a willing but not anxious vendor.”<sup>480</sup> However, the trial judge declined to follow the test in *Spencer* because in his view, native title is inalienable and cannot be sold in an open market.<sup>481</sup> Thus, it is inappropriate to apply the *Spencer* test to native title because doing so would be tantamount to treating native title as freehold estate.<sup>482</sup> He further held that the available market for native title could only be the NT or the Commonwealth (who happens to be the infringer). Therefore, it was held that the focus should

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<sup>474</sup> *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900 [*Griffiths 1*].

<sup>475</sup> *Northern Territory of Australia v Griffiths* [2017] FCAFC 106 (*Griffiths 2*).

<sup>476</sup> D3/2018 *Griffiths v Northern Territory of Australia & Anor*.

<sup>477</sup> *Griffiths 2*, *supra* note 475 at para 13.

<sup>478</sup> *Ibid* at para 42.

<sup>479</sup> *Spencer v Commonwealth* (1907) 5 CLR 418 at 432. See *Griffiths 1*, *supra*, note 474 at para 196.

<sup>480</sup> *Griffiths 1*, *supra*, note 474 at para 211.

<sup>481</sup> *Ibid* at para 211.

<sup>482</sup> *Ibid* at para 216.



be on what has been obtained by the presumed willing buyer (NT and Commonwealth).<sup>483</sup> This approach makes the calculation of compensation to be based on the gain of the infringer and not necessarily the loss of the native group. The learned trial judge was also of the firm view that the inalienability of native title does not make it less of value than freehold estate.<sup>484</sup>

In assessing compensation, the learned trial judge took cognizance of the fact that the native rights and interest are non-exclusive. He held that if an exclusive native title in line with *NTA* is valued in about same as freehold title, a non-exclusive native title should ordinarily be less than a freehold title.<sup>485</sup> Consequently, he held that the appropriate valuation of compensation is 80% of the freehold value.<sup>486</sup> This conclusion was reached after his findings via evidence that the degree of the non-exclusive interest was high. This is because the non-exclusive rights and interest gave the native group the right to prevent any further activity in the land except the existing tenures.<sup>487</sup> He further granted a pre-judgment interest by the simple interest of the market value from the date of the compensable acts to the date of judgment calculated in line with the practice note of the Federal High Court of Australia.<sup>488</sup>

On appeal by the NT, although the Full Court did not adopt a different approach, they cast doubt on the effectiveness of the *bifurcated approach* adopted by the parties at the trial court.<sup>489</sup> Consequently, the court held that a better approach would have been a *holistic approach* which will signify an all-inclusive compensation that will take cognizance of both the economic and non-economic losses without assessing them differently.<sup>490</sup> The Full Court held further that the holistic approach was more contemplated by s 51 (1) *NTA*.<sup>491</sup>

The Full Court reviewed the decision of the trial court as regards its assessment of the compensation payable for economic losses as follows:

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<sup>483</sup> *Ibid* at para 215.

<sup>484</sup> *Ibid* at para 216.

<sup>485</sup> *Ibid* at para 197.

<sup>486</sup> *Ibid* at para 232.

<sup>487</sup> *Ibid* at para 232.

<sup>488</sup> *Ibid* para 463.

<sup>489</sup> *Griffiths 2*, *supra* note 475 at para 42.

<sup>490</sup> *Ibid* at para 142.

<sup>491</sup> *Ibid* at para 142.

1. The trial judge erred by declining to follow the conventional approach as in *Spencer* for the assessment of compensation.<sup>492</sup>
2. The inalienability of native title makes it of less value than a freehold estate. Hence, the trial judge erred by not considering that fact in his assessment.<sup>493</sup>
3. By failure of the trial judge to follow the conventional test of *Spencer*, he included non-economic components of spirituality in the assessment of economic losses.<sup>494</sup>

Further to the above, the Full Court reassessed the economic value of the non-exclusive rights and interests of the Claim Group to be 65% of the freehold value.<sup>495</sup> The Full Court consequentially reduced the interest payable for the acts.<sup>496</sup> However, the court agreed with the trial judge that although the *NTA* does not preclude the calculation of interest by compound interest in appropriate circumstances, the interest payable based on the circumstances of that case should be on a simple interest basis.<sup>497</sup>

#### Compensation for Non-Economic Losses.

Valuation of compensation for non-economic losses appeared to be more complex as the court had no precedent of a mathematical formula to rely on or to adapt to the circumstances of the case, having regard to the *sui generis* nature of native title.<sup>498</sup> Undoubtedly, the spiritual losses and the loss of a Claim Group's connection to their land is compensable under the *NTA*, however, the Act does not provide any formula for assessing them. Non-economic losses are compensable because they are ordinarily part of the "loss, diminution, impairment or any other impact on the native title rights and interests" that must be compensated for under the *NTA*.<sup>499</sup>

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<sup>492</sup> *Ibid* at paras 109.

<sup>493</sup> *Ibid* at para 115.

<sup>494</sup> *Ibid* at paras 111 & 112.

<sup>495</sup> *Ibid* at paras 139.

<sup>496</sup> *Ibid* at para 465.

<sup>497</sup> *Ibid* at paras 199 & 213.

<sup>498</sup> Valuation of compensation for non-economic losses of an indigenous group entails the assessment in perhaps monetary form, the spiritual content of native title as well as the degree of the Claim Group's connection to their land.

<sup>499</sup> *NTA*, *supra* note 420 at s 51 (1).

Faced with the challenge of calculating the intangible, the trial court sought assistance from cases of compensation in areas of copyright, defamation, and other like claims that have intangible interests, but found little help because those claims were for personal and not for communal loss.<sup>500</sup>

Further to the difficulty in determining the appropriate value of the intangible losses of a native title for compensation for acts of the government, the trial judge held that such compensation should be granted by way of *solatium*. He describes *solatium* to be the compensation component that represents the loss or diminution of connection or traditional attachment to land, and not necessarily the value.<sup>501</sup> The trial judge set out what may be said to be the principles for the determination of *solatium* as follows:

1. Solatium must be assessed having regard to the particular nature of native interest (whether it is exclusive or non-exclusive interest).<sup>502</sup>
2. It must reflect the loss or impairment of traditional attachment to land arising from the particular extinguishment or interference in question (rather than from earlier or subsequent events or effects).<sup>503</sup>
3. The area of land affected must be assessed.<sup>504</sup>
4. Also, the spiritual and usufructuary significance of the land must be considered.<sup>505</sup>

The figure to be finally arrived at as *solatium* appears to be discretionary. Of course, the above factors seem to be the principles a judge is to bear in mind while exercising his discretion judicially and judiciously. This is because the primary judge held that the assessment of solatium is intuitive rather than being a product of careful calculation.<sup>506</sup> The lack of careful calculation is not based on lack of interest to do so but because of the complexity (or perhaps the impossibility) of mathematically giving a figure to the exact value of spiritual connection to land.<sup>507</sup> Further to the

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<sup>500</sup> *Griffiths 1*, *supra* note 474 at para 307. See also *Milpururru v Indofurm Pty Ltd* (1994) 54 FCR 240; *Cubillo v Commonwealth* (2000) 103 FCR 1; *Trevorrow v South Australia (No 5)* (2007) 98 SASR 136.

<sup>501</sup> *Ibid* at para 300.

<sup>502</sup> *Ibid* at para 301.

<sup>503</sup> *Ibid* at para 301.

<sup>504</sup> *Ibid* at para 302.

<sup>505</sup> *Ibid* at para 302.

<sup>506</sup> *Ibid* at para 302.

<sup>507</sup> *Ibid* at paras 302, 313 & 383. See also *Crampton v Nugawela* (1996) 41 NSWLR 176.

above, the trial judge assessed the compensation for non-economic losses to be \$1.3 Million.<sup>508</sup> The Full Court affirmed this assessment.<sup>509</sup>

### 3.2.3 Reflections on *Griffiths*

Before the decision of the FCA and FC in *Griffiths*, there were several comments and speculations as regards the possible implications of the compensation provisions of the *NTA*.<sup>510</sup> The decisions of the FCA and FC give an insight on the implications of those provisions as we await the final decision of the High Court of Australia.

That said, the approach of the FCA seems to reflect a better strategy to solving the problematic calculation of compensation for native title and the broader issue of the complexities of measurement of compensation as regards an indigenous land interest in other similar jurisdictions. The *bifurcated approach* of the FCA reduces the somewhat complexity in the valuation of the compensation for impairment of indigenous interest in their land. That approach presupposes that the economic losses are tangible and calculable while the non-economic losses are not. At least, this demystifies the complication in the calculation of compensation. This is because the economic losses may be said to be calculable with a mathematical formula (of course depending on the facts and circumstances of each case). In my opinion, the *bifurcated approach* is far better than a holistic approach where the whole indigenous interest in their lands is treated as incalculable.

Then, as regards the non-economic losses which is incalculable, the FCA first admitted that it is very difficult if not impossible to have a scientific formula to arrive at a monetary value. Therefore, to recompense of the affected indigenous group and in the interest of justice, the court leaves it in the intuition of the court which is to be exercised judicially and judiciously, having regard to the factors earlier pointed out.

The FCA and FC appear to differ on the formula to be adopted for the calculation of the economic losses. Again, the approach of the FCA might arguably be a better approach. Relying on the

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<sup>508</sup> *Ibid* at para 383.

<sup>509</sup> *Griffiths 2*, *supra* note 475 at para 420.

<sup>510</sup> Brian Keon-Cohen, “Compensation and Compulsory Acquisition under the Native Title Act 1993” (2002) 28 Monash U. L. Rev. 17 at 18. See also Sam Adkins *et al*, “Calculating the Incalculable: Principles for Compensating Impacts to Aboriginal Title” (2016) 54 Alta. L. Rev. 351 at 372-373.

conventional “market value” principles as set out in *Spencer* may be inappropriate as native title is not available in the open market. The FC held that the FCA should have applied the *Spencer* test by basing their calculation on a “hypothetical marketplace.”<sup>511</sup>

The problem with the approach of the FC is that “hypothesis” should be used in a situation where “reality” is lacking. In other words, the whole essence of creating a “hypothesis” to solve a particular problem is in a situation where an explanation is not tenable based on limited evidence. This is not the situation as far as native title is concerned. Native title is such that it has only one marketplace: in that particular case the NT or the Commonwealth (the government). Hence, there is no need to create a marketplace “hypothetically” where in reality there is only one marketplace which is tenable. The case of *Commonwealth v Arklay*<sup>512</sup> relied upon by the FC deals with the assessment of compensation for acquisition where wartime controls fixed price for the sale of land.<sup>513</sup> This kind of situation is clearly distinguishable from the limitation placed on native title. The limitation placed on native title is not as regards its value in terms of price, but as regards the available market for alienation.

Perhaps, the FC’s application of *Arklay* stems from their presumption, albeit erroneously that the inalienability of native title reduces its value when compared to a freehold estate. The FC’s decision provides no justifiable reason for their position that the inalienability of native title is a discounting factor in its value.<sup>514</sup> They supported their position with the case of *Geita Sebea v Territory of Papua*.<sup>515</sup> On the contrary, that case gives reasons to support the position that the inalienability of native title does not reduce its value. It was held in that case as follows:

The question whether the provision of the *Land Ordinance* restricting the rights of the appellants [natives] to sell or otherwise deal with the land affects its value should be answered in the negative. The Ordinance, sec. 3, provides that save as thereafter provided a native shall have no power to sell, lease, or otherwise deal with, or dispose of, any land, and any contract made by him to do so shall be

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<sup>511</sup> *Griffiths 2*, *supra* note 475 at paras 120-121.

<sup>512</sup> *Commonwealth v Arklay* (1952) 87 CLR 159

<sup>513</sup> *Griffiths 2*, *supra* note 475 at para 121.

<sup>514</sup> *Ibid* at 115.

<sup>515</sup> *Geita Sebea v Territory of Papua* (1941) 67 CLR 544.

void. But the Government may in certain cases purchase or lease native lands (sec. 5). The *Lands (Kila Kila Aerodrome) Acquisition Ordinance 1939*, however, disposes of the matter. It enables the Government to acquire the lands in question here and prescribes for payment of compensation to the natives or persons entitled thereto.<sup>516</sup>

Having identified that the only market available for native title is the Crown, the approach of the FCA wherein it deduced the value of the economic interest of indigenous peoples in land from the benefit of the Crown makes sense. This was the approach adopted in *Geita Sebea*.<sup>517</sup> A contrary argument would be that if that approach is adopted, the indigenous group affected may be left uncompensated where the Crown makes no gain. This argument may actually not be correct, because the gain that is to be assessed should be the gain that the Crown would ordinarily make from such extinguishment or impairment and not necessarily the actual gain that the Crown has made. The approach adopted by the FCA happens to be a very practical and logical-mathematical formula for the calculation of the economic loss occasioned by the infringement of a native title. Furthermore, the pre-judgment interest calculated by simple interest from the day of the act, of course, makes sense and portrays fairness.

As regards the non-economic loss, the trial judge was also very practical. He first admitted the impossibility of placing a figure on the spiritual connection to land. His reason is obviously that apart from the fact that such connection is intangible, it has no market value. Hence, the sole essence of compensation in such a situation is not to pay back the indigenous group for the deprivation of the connection, but to recompense for the deprivation. That said, he left that area to be uncertain and dependent on the intuition of the judge after consideration of requisite factors. This shows the beauty of a *bifurcated approach* to the calculation of compensation. If not for that approach, the whole of a native title may be taken as incalculable.

Canada may draw from Australia for the development of their compensation regime as follows:

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<sup>516</sup> *Ibid* at 555 (Emphasis Added).

<sup>517</sup> *Griffiths I*, *supra*, note 474 at para 215.

- a) The first thing that Canada can draw from Australia is the need for the enactment of a legislative framework that will set out the principles for the determination of compensation for both past and future infringements. Such a legislative regime will increase certainty and structure in this area and of course, clarify the different variations that are existent in Canada.<sup>518</sup>
- b) Another principle that is key is the *bifurcated approach* of the FCA. This approach as I have earlier submitted shows that the native title (and Aboriginal title) is not as incalculable as has been thought.
- c) The approach in *Geita Sebea* which was accepted by the FCA in *Griffiths* that the inalienability of native title does not reduce the value of native title when compared to a freehold seems to be a good principle to be adopted in Canada. In fact, this appears to be the position of the law in Canada.<sup>519</sup> However, some scholars in Canada have made a contrary argument that the inalienability of Aboriginal title reduces its market value.<sup>520</sup> This position is not anchored on any strong legal principle. Hence it is pertinent to be clear that inalienability does not reduce its value.

The importation of the experience in Australia should be in such a way that will make it adapt to, clarify and develop the already existing Canadian approach to compensation and should not be a total replacement. For instance, the emphasis of the FCA on the gain of the Crown may be used in Canada, however not in all circumstances. This is because as demonstrated in chapter two, the way fiduciary principles of compensation work depend on the circumstances of each case. Sometimes it seeks to access the actual loss of an indigenous group based on the creation of an expectation by the Crown as in *Guerin v. The Queen*.<sup>521</sup> Other times, it may strive for the restitution of the gain of the infringer due to the existence of unjust enrichment.

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<sup>518</sup> Adkins *et al*, *supra* note 10 at 380.

<sup>519</sup> *Tsilhqot'in Nation* *supra* note 6 at para 73. The SCC held that "Aboriginal title confers ownership rights similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to proactively use and manage the land." If Aboriginal title confers all these rights, consequently, its inalienability like in *Geita Sebea* should not be a discounting factor.

<sup>520</sup> Isaac, *Aboriginal Title* *supra* note 93 at 47-48.

<sup>521</sup> [1984] 2 R.C.S. 335.

### 3.3 The Experience in Malaysia

#### 3.3.1 Native Title in Malaysia (An Overview)

The development of native title in Malaysia was largely (if not wholly) influenced by Aboriginal title in Canada as expounded in *Calder* and native title in Australia as established in *Mabo*. The indigenous people in Malaysia may be said to include the *Malays, natives of Sabah and Sarawak and the Orang Asli* as indigenous peoples.<sup>522</sup> The recognition of the rights and interests of indigenous peoples of Malaysia to their native title is credited to the cases of *Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor (Adong)*<sup>523</sup> and *Sagong Tasi & Ors v. Kerajaan Negeri Selangor & Ors (Sagong Tasi)*.<sup>524</sup> In *Adong* the High court formally established that the Malaysian jurisprudence recognizes native title, therefore making Malaysia be in line with other Commonwealth nations like Canada and Australia.<sup>525</sup> Subsequent cases have gone further drawing from the principles set in *Adong* to explain the nature and content of native title in Malaysia.<sup>526</sup> In the recent case of *Sangka Chuka & Anor v. Pentadbir Tanah Daerah Mersing, Johor & Ors*<sup>527</sup> the High Court of Malaya summarized the nature, scope, and content of native title in Australia as has been recognized by *Adong* and *Sagong Tasi* as follows:

1. The indigenous peoples have a right to their ancestral land provided there is a continuous and unbroken occupation and enjoyment of rights to the land.<sup>528</sup>

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<sup>522</sup> S. Robert Aiken & Colin H. Leigh, "Seeking Redress in the Courts: Indigenous Land Rights and Judicial Decisions in Malaysia" (2011) 45:4 *Modern Asian Studies* 825 at 829. S. Robert Aiken & Colin H. Leigh suggest that these groups are not recognized in the same way. For instance, they point out that the Orang Asli people are recognized "grudgingly" as indigenous peoples. Some other scholars suggest that 'indigenous peoples' does not include nationally dominant majority peoples like the Malays. For this see Kirk Endicott, 'Indigenous Rights Issues in Malaysia' in Bartholomew Dean and Jerome M. Levi, eds, *At the Risk of Being Heard: Identity, Indigenous Rights, and Postcolonial States*, (Michigan: University of Michigan Press, 2003) at 145. Thus, it appears there may still be some issues with respect to the definition of indigenous peoples in Malaysia which happen not to be within the scope of this research.

<sup>523</sup> *Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor* [1997] 3 MLRH 95 (Court of Appeal *Kerajaan Negeri Johor & Anor v. Adong Kuwau & Ors* [1998] 1 MLRA 170).

<sup>524</sup> *Sagong Tasi & Ors v. Kerajaan Negeri Selangor & Ors* [2002] 1 MLRH 161 (Court of Appeal *Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors* [2005] 1 MLRA 819).

<sup>525</sup> Aiken & Leigh, *supra* note 522 at 825.

<sup>526</sup> *Nor Anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 1 MLRH 304 (Court of Appeal *Superintendent of Lands & Surveys Bintulu v. Nor Anak Nyawai & Ors and another Appeal* [2005] 1 MLRA 580) and *Madeli Salleh v. Superintendent of Lands & Surveys & Anor* [2005] 1 MLRA 599 (Federal Court *Superintendent Of Lands & Surveys Miri Division & Anor v. Madeli Salleh* [2007] 2 MLRA 390).

<sup>527</sup> *Sangka Chuka & Anor v. Pentadbir Tanah Daerah Mersing, Johor & Ors* [2017] 2 MLRH 286.

<sup>528</sup> *Ibid*, at para 30(i).



2. Native title pre-dates the Aboriginal Peoples Act 1954 of Malaysia (which only complements and does not extinguish native title).<sup>529</sup>
3. Native title is *sui generis*, and it is inclusive of the right to live on the land, move about freely without disturbance or interference.<sup>530</sup>
4. Native title is inalienable. It is a form of proprietary right within the scope of Section 13 of the Federal Constitution of Malaysia<sup>531</sup> and thus enjoys constitutional safeguards against deprivation of native interests without compensation. Its extinguishment can only be on the grounds of public purposes by a clear provision of legislation and after payment of adequate compensation.<sup>532</sup>
5. The test of occupation for native title is the existence of exclusive occupation. However, actual physical presence is not mandatory.<sup>533</sup>
6. The Federal and State governments owe a fiduciary duty to protect the land rights of indigenous peoples of Malaysia.<sup>534</sup>

The above features show that the nature of native title in Malaysia is more in line with the Aboriginal title of Canada than the native title of Australia, especially where it comes to the requirements for establishment. For Canada and Malaysia, the focal point for the establishment of native title is occupation whereas Australia emphasizes on proof of native law and custom possessed by an indigenous group in connection to the land.

### **3.3.2 Principles for Determination of Compensation upon extinguishment of Native Title in Malaysia**

Malaysia may not have a compensation regime as organized as that of Australia, but their jurisprudence shows that efforts have been made to develop principles for determination of adequate compensation where native title is extinguished.

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<sup>529</sup> *Ibid*, at para 30(ii). This is akin to the position in Canada by virtue of *Calder*; that the *Royal Proclamation of 1763* affirms the existence of Aboriginal title, but it does not create it.

<sup>530</sup> *Ibid*, at para 30(iii).

<sup>531</sup> *Federal Constitution of Malaysia (Federal Constitution)*, 1957.

<sup>532</sup> *Sangka Chuka*, *supra* note 527 at para 30(iv).

<sup>533</sup> *Ibid*, at para 30(vi).

<sup>534</sup> *Ibid*, at para 30(ix).

The case of *Adong* established that there is a mandatory requirement of adequate compensation in line with Article 13 of the *Federal Constitution of Malaysia* to be paid to a native group for the losses of their usufructuary rights.<sup>535</sup> Article 13 of the *Federal Constitution* is a general provision that states that nobody should be deprived of property compulsorily in accordance with the law without adequate compensation.<sup>536</sup> This provision is not specifically meant for native title, and it did not set out the factors that will determine when compensation becomes adequate. In *Adong*, the government ejected some native families from their lands to build a dam to supply water to the Republic of Singapore.<sup>537</sup> The indigenous group affected filed an action claiming compensation for deprivation of their native title under the common law and proprietary rights provisions under Article 13 of the *Federal Constitution*.<sup>538</sup> The High Court per Justice Sidin awarded compensation only for the produce on the land.<sup>539</sup> He declined to award compensation for the land itself or for cultural or heritage reasons as it was impossible to do so in his opinion.<sup>540</sup> The Court of Appeal of Malaysia affirmed the same decision, and the Federal Court of Malaysia<sup>541</sup> also upheld the decision of the High Court.<sup>542</sup>

A different approach was taken in *Sagong Tasi* in the assessment of compensation. In that case, the High Court held that for compensation of deprivation of the proprietary rights of a native group under Article 13 of the *Federal Constitution* to be adequate, it has to be assessed in accordance to the provisions of the *Federal Land Acquisition Act (LAA)*.<sup>543</sup> LAA is an Act generally made for the acquisition of land, assessment of compensation where land is compulsorily acquired and other incidental matters.<sup>544</sup> Thus, this Act is akin to an expropriation law for fee simple and not specifically enacted for native title. However, the High Court applied the Act to native title by giving a purposive interpretation to its section 2 which defines “land.”<sup>545</sup> By that section, land to which the Act applies are “alienated land within the meaning of the State land law, land occupied

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<sup>535</sup> Anuar Alias & Md Nasir Daud, *Saka: Adequate Compensation for Orang Asli Native Land* (Johor: Pejabat Penerbit) at 61. A usufructuary right gives the bearer a right to property to use and draw from same profits, utility or any good it may produce provided that the substance of the property remains unaltered.

<sup>536</sup> *Federal Constitution*, *supra* note 531 at Art 13 (2).

<sup>537</sup> *Adong*, *supra* note 523 at 423-424.

<sup>538</sup> *Ibid*.

<sup>539</sup> *Ibid* at 436.

<sup>540</sup> *Ibid* at 436. See also Aiken & Leigh, *supra* note 522 at 856.

<sup>541</sup> The apex court in Malaysia.

<sup>542</sup> Aiken & Leigh, *supra* note 522 at 856-857.

<sup>543</sup> *Land Acquisition Act*, Act 486, 1960 (LAA). See *Sagong Tasi*, *supra* note 524 at 619.

<sup>544</sup> *Ibid* at Long title.

<sup>545</sup> *Sagong Tasi*, *supra* note 524 at 619.

under customary right and land occupied in expectation of title.”<sup>546</sup> The Act does not define “land occupied under customary right”, however, the court adopted a purposive interpretation extending it to native title to ensure that a group whose interest in land is acquired (wholly or partly) are granted adequate compensation.<sup>547</sup> The Court held that for compensation to be adequate, it must follow the provisions of *LAA*.<sup>548</sup> This decision was affirmed by the Court of Appeal of Malaysia.<sup>549</sup>

Succinctly put, the factors to be considered under the *LAA* in the assessment of compensation are the market value of the land and the damage, if any, sustained or likely to be sustained by the person interested; whose interest in land is acquired.<sup>550</sup> To get the market value, land is assessed by a qualified valuer who will have regard to the prices paid for the recent sales of land of similar characteristics, situated within the vicinity of the acquired land.<sup>551</sup> The court was silent in *Sagong Tasi* on the mechanism to be used in applying the provisions of *LAA* to native title having regard to its peculiarities. The expectation is that in the application of *LAA*, the provisions will be interpreted to align with the peculiar circumstances surrounding native title. For instance, Section 40A of *LAA* provides as follows:

Where the objection before the Court is in regard to the amount of the compensation, the Court shall appoint two assessors (one of whom shall be the valuation officer employed by the Government) for the purpose of aiding the Judge in determining the objection and in arriving at a fair and reasonable amount of compensation.

This provision takes cognizance of the fact that a judge may not be versed in the valuation of land with diverse characteristics in different cases that may arise. Hence, the provision presupposes that the assessors to be appointed would have something of value to deliver to the court which is predicated on their knowledge and experience with the kind of land under consideration. Where native title is the subject matter of the suit, the two assessors to be appointed should ordinarily be knowledgeable in the characteristics of the particular nature of the native title under consideration.

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<sup>546</sup> *LAA*, *supra* note 543 at s 2 (Emphasis added).

<sup>547</sup> *Sagong Tasi*, *supra* note 524 at 619.

<sup>548</sup> *Ibid* at 622.

<sup>549</sup> *Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors* [2005] 1 MLRA 819.

<sup>550</sup> *LAA*, *supra* note 543 at Art 2 of 1<sup>st</sup> Schedule.

<sup>551</sup> *Ibid* at Article 1 (1A) of 1<sup>st</sup> Schedule.

Also, as one of the assessors is to be appointed by the government (who is a party to the suit), the other should ordinarily be appointed by the native community affected. This will ensure balance, fairness and further imbue the confidence of the indigenous group in the fair evaluation of compensation.

Where the assessors arrive at a decision, they are to make reports to the judge which will form the basis of the judge's final decision. If there is a conflict between their reports, then the judge shall elect the decision to take having regard to the facts and circumstances of the case.<sup>552</sup> These provisions were not invoked in *Sagong Tasi* however since the case orders a full application of the provisions LAA, in native title compensation cases, the use of assessors who are versed in the knowledge of the nature of native title should be a better mechanism towards ensuring adequate compensation.

### 3.3.3 Reflections on the Malaysian Compensation Regime

Irrespective of the fact that *Sagong Tasi* may be an improvement from the earlier provision in *Adong*, legal scholars in Malaysia are still dissatisfied with the approach adopted in *Sagong Tasi*. This is premised on the fact that the approach does not consider the cultural and spiritual deprivation (intangible losses) occasioned dispossession of a native group's interest in their land.<sup>553</sup> Hence, contrary to the position in Australia that adopted a *bifurcated approach* where the tangible and intangible (economic and non-economic) losses are valued disjunctively, the Malaysian approach is restricted to the economic losses of land. However, in the calculation of the economic value of native land in Malaysia, there is no contention on whether or not the inalienability of native land makes it of less value when compared to freehold title. In fact, the position in Malaysia appears to be that the market value given to a freehold title remains the starting point for compensation where native title is involved.<sup>554</sup> This is because LAA is a general expropriation law originally meant for freehold estate before *Sagong Tasi* extended same to native title. The language of the Act may actually suggest that same can be adapted to the peculiarities of native title where the need arises. In addition, nothing in LAA precludes the calculation of non-economic interest of land.

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<sup>552</sup> *Ibid* at s 40D (1) & (2).

<sup>553</sup> Aiken & Leigh, *supra* note 522 at 865.

<sup>554</sup> Alias & Daud, *supra* note 535 at 99.

Although the compensation regime of Malaysia may not look quite developed, there are some mechanisms that Canada could draw from in the development of their framework. The first has already been emphasized earlier: the inalienability of Aboriginal title should not be a discounting factor in the assessment of the economic value. That said, it makes sense to argue that the freehold market value of a freehold estate should be the starting point to the calculation of the economic limb of the compensation.<sup>555</sup>

Another important lesson that can be adopted from *LAA* into the Canadian system is the need to appoint assessors where issues of compensation for infringements of Aboriginal title are raised. This area of law may never be entirely certain owing to the nature of Aboriginal title and the complex situations that can arise from varying circumstances. However, it will be a step in the right direction to involve experts in this field to be involved in such an evaluation.

One may argue that the position of assessors may not be necessary as the court could always rely on the testimonies of expert witnesses. Well, in response to the anticipated argument, the position of assessors and their reports under the *LAA* will in my respectful view have more probative value and are more compelling than any expert witness may have.<sup>556</sup> Of course, the assessors in the Canadian context will not be restricted to the valuation of the tangible losses. They may extend to non-economic losses. It may be difficult, if not impossible for assessors to calculate the intangible monetarily but their role as regards the intangible losses will be to help the court exercise its discretion judicially and judiciously as regards the appropriate figure to be considered as solatium. This can be done by assessing the factors that should guide the judge in coming up with a solatium. These factors as in a Canadian context include the particular nature of the Aboriginal title, the nature of the infringement, the severity of infringement and the extent of accommodation of Aboriginal interest.

The use of assessors may be a good way to bring in Aboriginal perspective in the determination of compensation. The qualification should ordinarily be that the persons should have a track record

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<sup>555</sup> *Ibid.*

<sup>556</sup> The use of assessors will not preclude the parties from calling experts as witnesses if they so wish. In fact, the assessors, based on their requisite knowledge and background on the subject matter of the suit are even in a better position to evaluate the weight of the testimony of the experts (if they are called).

which shows expertise in issues concerning Aboriginal title, especially relating to the particular nature of the subject matter of the suit. Also, to ensure that Aboriginal perspectives are employed in the determination of compensation, strong efforts should be made to appoint indigenous peoples as assessors.

It is a truism that the use of assessors cannot be adopted unilaterally by the courts without an enabling statute. The next chapter makes a case for the use of assessors to form part of the legislative framework that the chapter proposes. The proposal in the next chapter shows why in my view the use of assessors may be desirable in the determination of compensation for infringement of Aboriginal title in Canada.

### **3.4 Determination of Compensation for Violation of Indigenous Land Rights under the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)* 2007.**

#### **3.4.1 Redress for Infringement of Land Rights Under *UNDRIP***

The *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*<sup>557</sup> adopted by the UN General Assembly universally consolidates the rights of indigenous peoples.<sup>558</sup> More importantly, the Declaration makes copious provisions on the land rights of indigenous peoples.<sup>559</sup> *UNDRIP* has been described as an instrument characterized by a hard content because it exhibits an extensive list of rights of indigenous peoples and imposes a lot of state obligations.<sup>560</sup> More so, its extended protection of indigenous peoples' land rights has been argued to touch upon state territorial sovereignty.<sup>561</sup> Thus, the potential conflict between the territorial sovereignty of states and the protection of the land rights of indigenous peoples seems to be the reason for the reluctance in the implementation of the contents of the Declaration in several states.<sup>562</sup>

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<sup>557</sup> *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*, 13 September 2007, A/RES/61/295.

<sup>558</sup> Jérémie Gilbert, *Indigenous Peoples' Land Rights under International Law: From Victims to Actors*, 2<sup>nd</sup> ed (Boston: Brill Nijhoff, 2016) at 7.

<sup>559</sup> *UNDRIP*, *supra* note 557 at Arts 26-32.

<sup>560</sup> Mauro Barelli, "The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples" (2009) 58 Int'l & Comp. L.Q. 957 at 972.

<sup>561</sup> Gilbert, *supra* note 558 at 10.

<sup>562</sup> *Ibid* at 10.

Canada was one of the four states that voted against the adoption of the Declaration owing to its character and content.<sup>563</sup> However, on 12 November 2010, Canada issued a statement endorsing the UN Declaration.<sup>564</sup> Later, on 9 May 2016, Canada officially endorsed the Declaration and removed their objection.<sup>565</sup> It is worthy of note however that the adoption of the Declaration by Canada does not in itself make it binding as it is a Declaration adopted by the General Assembly of the United Nations and therefore a non-binding soft law.<sup>566</sup> Since the adoption of the Declaration by Canada, the state has been working and deliberating on its implementation. This has generated a debate on the potential impact the character and content of *UNDRIP* may have on the already existing framework for the protection of the rights of indigenous people in Canada.

Currently, there is a Bill before the Senate of Canada for the implementation of *UNDRIP*.<sup>567</sup> However, Dwight Newman contends that the effect this Bill may have on the Canadian legal system if it is passed is uncertain.<sup>568</sup> Thus, he argues that there are chances that the Bill may actually “cause enormously negative unintended consequences.”<sup>569</sup> This argument, of course, is not only based on the content of the Declaration but also on the content of the Bill.

Further to the above and in the context of this thesis, it is pertinent to examine the compensation provisions in *UNDRIP* to see the effect they might have in Canada if Bill C-262 (or a similar Bill that bears on the implementation of *UNDRIP*) gets passed. On the other hand, where the Bill (or a similar Bill) does not get passed for the implementation, it is equally important to examine *UNDRIP*. This is because although *UNDRIP* is a non-binding soft law, it has gained international

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<sup>563</sup> Barelli, *supra* note 560 at 957. Other states that voted against the adoption of *UNDRIP* are Australia, the United States of America and New Zealand.

<sup>564</sup> Blaine Favel & Ken S. Coates, “Understanding UNDRIP: Choosing Action on Priorities over Sweeping Claims about the United Nations Declaration on the Rights of Indigenous Peoples” (2016) Online: 10 Canada and Resource Economy Series, Macdonald Laurier available at <<https://www.macdonaldlaurier.ca/files/pdf/MLI-10-UNDRIPCoates-Flavel05-16-WebReadyV4.pdf>> at 1.

<sup>565</sup> *Ibid* at 1.

<sup>566</sup> Gilbert, *supra* note 558 at 7.

<sup>567</sup> *Bill C-262, An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples*. As of 8 June 2018 is at second reading in the Senate.

<sup>568</sup> Dwight Newman, “Re Bill C-262 (An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples)” (Written Brief to House of Commons Standing Committee on Indigenous and Northern Affairs to Accompany Oral Submission, 17 April 2018) at 3.

<sup>569</sup> *Ibid* at 1.

momentum.<sup>570</sup> Thus, its provisions may in the nearest future be a strong persuasive authority for the determination of indigenous rights in diverse jurisdictions including Canada.

Article 28 which addresses the issue of redress for violation of the land rights of indigenous peoples under *UNDRIP* states as follows:

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Generally, the rights of indigenous peoples over land may be categorized into past, present, and future.<sup>571</sup> To properly understand the scope of the redress provision of Article 28, it is important to understand the scope of indigenous land rights under *UNDRIP*.<sup>572</sup> Article 26 provides as follows:

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

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<sup>570</sup> For this see Barelli, *supra* note 560 at 966-968. Barelli argues that “The non-binding nature of the Declaration does not negatively affect the value of the document. Rather than limiting its potential universality, it actually enhanced it.”

<sup>571</sup> Jérémie Gilbert & Cathal Doyle, “A New Dawn over Land: Shedding Light on Collective Ownership and Consent” in Stephen Allen & Alexandra Xanthaki, eds, *Reflection on the UN Declaration on the Rights of Indigenous Peoples* (Oxford: Hart Publishing Limited, 2011) 289 at 294.

<sup>572</sup> This is based on the premise that remedies are products of rights.



3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

There is an ongoing debate on the scope of the above provision. Some scholars are of the view that the provision recognizes and protects the indigenous peoples' right to use own, develop and control their present-day land and does not extend to lands which are not presently occupied by indigenous peoples.<sup>573</sup> Some scholars that adopt this view argue that the word "traditional" used in Article 26 implies "practice" and does not in any way mean history.<sup>574</sup> On the other hand, some other scholars submit that Article 26 is a clear provision that could be used to activate the redress of restitution of land not presently in occupation by indigenous peoples.<sup>575</sup> The scope of the land rights provision of Article 26 is important because it may equally define the scope of the redress provision of Article 28.<sup>576</sup>

Article 26 may not be as ambiguous as scholars may have argued it to be. The somewhat ambiguity that the provision portrays only comes to light where ordinary dictionary meanings are not given to the provisions because of perhaps the extensive nature of rights created therein and the impact they might have to the territorial sovereignty of states. Considering the legal status of *UNDRIP* as a non-binding instrument, the better approach may be to give the literal interpretation to such provisions, so that when states are adopting same into their legal systems, they may adopt it with qualifications that will better suit the circumstances of such states. That said, the phrase "*traditionally owned, occupied or otherwise used or acquired*" clearly in my view shows that the land rights may extend to lands that are not presently occupied by indigenous peoples. Credence may be given to this contention when one interprets Article 26 bearing in mind the purpose of the Declaration as set out in its preamble. One of the primary concerns that informed the passing of the Declaration is the historic injustices suffered by indigenous peoples as a result of "dispossession of their lands, territories, and resources, thus preventing them from exercising, in

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<sup>573</sup> Gilbert & Doyle, *supra* note 571 at 294; Stephen Allen, "The UN Declaration on the Rights of Indigenous Peoples and the Limits of the International Legal Project" in Stephen Allen, Alexandra Xanthaki, eds, *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Oxford: Hart Publishing Limited, 2011) 225 at 240.

<sup>574</sup> Allen, *supra* note 573 at 240.

<sup>575</sup> GN Barrie, "The United Nations Declaration on the Rights of Indigenous People: Implications for Land Rights and Self-Determination" (2013) 2 TSAR 292 at 298.

<sup>576</sup> Chapter one argues that rights and remedies are intrinsically linked, and the scope of remedies is always based on the character, scope and content of rights sought to be redressed.

particular, their right to development in accordance to their own needs and interests.<sup>577</sup> The phrase “in accordance to their own needs and interests” signifies their “tradition.” Hence, Article 26 emphasizes their right to the lands that indigenous peoples occupied in the past; which they developed according to their tradition (traditionally owned); which they have been dispossessed of as a result of colonization or invasion. Thus, *UNDRIP* became necessary to redress the injustice of dispossession by affirming the rights and giving a redress which includes restitution of land where possible.

Also, it is worthy of note that Article 26 is not an “unqualified right.” Where Article 26 is read together with the redress provision of Article 28, one would understand that the land rights given by Article 26 would not continue with lands which were taken with the free, prior and informed consent of indigenous peoples. Hence, the lands which the indigenous peoples surrendered by treaties are not ordinarily covered by Article 26. This is because the redress provision of Article 28 does not extend to lands “freely surrendered” by an indigenous group. Another qualification of the rights can be seen in Article 46 (2) which makes the rights in the Declaration to be subject to the respect of the non-discriminatory human rights and fundamental freedoms of others. This qualification should ordinarily extend to the property rights of bona fide holders of a freehold estate in land.

Further, the essence of Article 28 is to provide redress for indigenous peoples who were, are and may be victims of deprivation or dispossession of their land rights which they have not surrendered by their free, prior and informed consent. The choice of redress will depend on the facts and circumstances of each case. That article provides for two categories of redress: restitution of land and compensation. Jérémie Gilbert contends that the use of the word “redress” in the article dilutes the possibility of “restitution.”<sup>578</sup> This is because Article 27 of the Draft Declaration which due to opposition could not make it to the final Declaration expressly provides for the right to restitution and not redress.<sup>579</sup> Notwithstanding that argument, the fact remains that restitution of land is still a viable remedy and the first option of redress to be considered under *UNDRIP*. Thus, under Article 28, compensation is of last resort where restitution of land is impossible. The situations that may

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<sup>577</sup> *UNDRIP*, *supra* note 557 at Preamble (Emphasis added).

<sup>578</sup> Gilbert, *supra* note 558 at 167.

<sup>579</sup> *Ibid* at 167.

make restitution of land to be impossible may include instances where domestic legislation has provisions to that effect; justifiable infringements or where the lands are occupied by bona fide purchasers of land for value who currently hold land in fee simple.

### **3.4.2 Principles for the Determination of Compensation Under UNDRIP**

*UNDRIP* is very clear that infringements of the land rights of indigenous peoples are compensable where restitution of lands prove impracticable. Further to this, Article 28 provides some factors that will determine the appropriate compensation for violation of indigenous land rights.

First, for there to be a valid compensation, it must be *just, fair and equitable*.<sup>580</sup> These are general principles of law that should be the expectation or minimum standard of every compensation. However, what amounts to a just, fair and equitable compensation will always depend on the nature of the right being protected and other factors that may affect the measure of compensation. The provision of Article 28 (1) is akin to the provision of *NTA* that compensation must be in just terms. *UNDRIP* further explains what might amount to just compensation for deprivation or dispossession (wholly or partly) of the indigenous land rights and interests. It provides that compensation may be in the form of “lands, territories, and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress” unless otherwise freely agreed upon by the peoples concerned.<sup>581</sup>

The forms of compensation that *UNDRIP* provides in line with meeting the standard of being “just, fair and equitable” is the replacement of the land with another land of similar quality, size and legal status. “Similar quality” should ordinarily encompass the non-economic component of indigenous lands; “size” alludes to the economic component of the land while the “legal status” of the land should ordinarily touch both the economic and non-economic component. Getting a land which will have a similar nature, size, as well as legal status of a dispossessed land which equally is not occupied by a third party or another indigenous group (or subject to negotiation or dispute), might be a complex task. Thus, in practical terms, monetary compensation which appears to be of last resort from the order of Article 28 may be the most realistic compensation.

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<sup>580</sup> *UNDRIP*, *supra* note 557 at Art 28 (1).

<sup>581</sup> *Ibid* at Art 28 (2).

The Declaration does not provide a mathematical method for the determination of just, fair and equitable compensation but, it should ordinarily reflect the size, quality, nature and legal status of the land as other compensation options in Article 28. Thus, the task here will now be to decipher the method by which monetary compensation will signify the size, quality, nature and legal status of a deprived land right. The Declaration does not provide a methodology for assessing the appropriate compensation, perhaps because the instrument lays more emphasis restitution of land or reallocation which may appear to be impossible in a lot of circumstances.

That said, it appears that the full implementation of *UNDRIP* in Canada will not cure the speculation and variations as regards the principles for determination of compensation upon infringement of Aboriginal title. However, one thing appears to be clear: *UNDRIP* makes allusions to compensable economic and non-economic components of indigenous land rights. The recognition of the spiritual and cultural component of indigenous land rights runs through different provisions of *UNDRIP*, first of which is the preamble that states that the Declaration recognizes the urgent need to respect the cultural and spiritual traditions of indigenous peoples, especially their rights to their lands and territories.<sup>582</sup> Subsequently, Article 28 shows that compensation extends to the quality of the land and its legal status. The intangible component of the indigenous lands is subsumed in those factors.

Since *UNDRIP* does not provide a procedure for the measurement of just, fair and equitable compensation, it leaves the state parties with the duty to design an appropriate methodology for same. This shows that the full implementation of *UNDRIP* in Canada will not bridge the gap in the compensation regime for infringement of Aboriginal title in Canada. As far as *UNDRIP* is concerned, the methodology used for measurement of compensation may not matter once it meets the minimum standard of being just, fair and equitable. In my view, the ideal procedure for the measurement of both the economic and non-economic losses occasioned by the dispossession or deprivation of the land rights of indigenous peoples should be the *bifurcated approach* as applied in *Griffiths*. The reasons for this have already been explored earlier in this chapter. Also, the character and content of *UNDRIP* accommodate that approach once an indigenous group whose rights have been deprived receive just, fair and equitable compensation.

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<sup>582</sup> *Ibid* at Preamble. See also Art 25.

### 3.5 Conclusion

The pertinent question to ask at this juncture is; what has this jurisdictional comparison achieved? The survey of the of the experiences in Australia and Malaysia gives a direction to mechanisms for the determination of compensation for infringement of indigenous land rights, some of which may stand as persuasive authority to courts in Canada. Of course, the application of these principles in Canada may be adapted with necessary changes to suit the peculiar nature of Aboriginal title in Canada.

The analysis in this chapter shows that the measure of compensation for infringements on indigenous land rights and interests may not be incalculable especially where the *bifurcated approach* applied by the Federal Court of Australia in *Griffiths* is adopted. That approach demystifies the somewhat complexity in the assessment of compensation for dispossession or deprivation of the land rights of indigenous peoples. The approach independently calculates the calculable tangible losses occasioned by dispossession or deprivation of an interest in land (wholly or partly); then grants a *solatium* for the incalculable intangible losses. The *solatium* is based on the intuition of the judge after a consideration of requisite factors.

Further, the Malaysian experience shows that the freehold estate market value of native title is the starting point in the calculation of compensation. Although the compensation regime in Malaysia is not as developed when compared to that of Australia, the provision for assessors under the LAA is worthy of emulation to ensure a due assessment of the nature of native title and other factors necessary to ensure fair compensation.

Finally, *UNDRIP* emphasizes that the standard for adequate compensation is that it must be just, fair and equitable. It makes this provision without stating a specific mechanism for the actualization of that standard. This gives state parties room to develop a procedure that will ensure that compensation is just, fair and equitable.

The preceding appraisal also shows that none of the three systems considered is independently flawless or fully certain on the principles for the calculation of compensation. However, a

combination of suitable concepts from the different jurisdictions may be used for purification of the situation in Canada.

That said, while making recommendations, the next chapter will show how the suitable concepts in Australia, Malaysia, and *UNDRIP* could be used to develop the appropriate legal principles for the determination of compensation upon infringement of Aboriginal title in Canada.

## CHAPTER FOUR: CONCLUSION

### 4.1 Summary of Findings

The legal survey so far shows that the legal principles for the determination of compensation for the infringement of Aboriginal title in Canada are undeveloped. The uncertainty in this area stems from the fact that Aboriginal title is a unique concept of land right and Canada is yet to establish definite rules that address the determination of compensation when it is infringed. It is not to say that Canada is completely void of some principles that touch upon compensation, however, the existing principles are filled with variabilities that leaves the legal regime uncertain. The reason for the existence of variabilities in different circumstances may be because some of those sources do not directly address the issue of compensation for infringement of Aboriginal title in Canada.

It is pertinent to emphasize again at this juncture that not all the laws examined in chapter two of this work are legally applicable to Aboriginal title.<sup>583</sup> Apart from the *Royal Proclamation of 1763*, the *Indian Act*<sup>584</sup> and perhaps the variabilities that stem from *Delgamuukw*<sup>585</sup> other sources discussed either have a limited application or legally inapplicable. For example, modern treaties are specifically negotiated agreements that are binding to the parties; *Specific Claims Tribunal Act* (SCTA) affects the rights of a First Nation where the First Nation chooses to file a claim in the Specific Claims Tribunal;<sup>586</sup> and expropriation law principles are not legally binding in cases of infringement of Aboriginal title. However, these sources are appraised because some of the principles deducible from them might serve as persuasive authorities for the courts. This may be in line with the decision of the Supreme Court of Canada in *Tsilhqot'in Nation* where it was held that the usual remedies applicable for breach of interest in other lands might apply to Aboriginal title land cases in so far as the principles that inform the remedies are adapted to suit the nature of Aboriginal title.<sup>587</sup>

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<sup>583</sup> Chapter two examines the extant legal principles for the determination of compensation for infringement of Aboriginal title in Canada.

<sup>584</sup> *Indian Act*, RSC 1985.

<sup>585</sup> *Delgamuukw* *supra* note 2 at para 169.

<sup>586</sup> SCTA, *supra* note 325 at s 5.

<sup>587</sup> *Tsilhqot'in Nation*, *supra* note 6 at para 90.

The standard for evaluation of the fairness of the Crown's dealings with Aboriginal peoples including decisions and acts that affect Aboriginal title seems to be the *honour of the Crown*.<sup>588</sup> This presupposes that for an action, decision or omission of the Crown concerning Aboriginal rights to be valid, it must be of such that meets the honour and good faith of the Crown.<sup>589</sup> Invariably, the standard for fair and sufficient compensation for infringement of Aboriginal title should be in line with the honour and good faith of the Crown. This standard, unfortunately, does not in practical terms clarify the formula to be used for the calculation of compensation.

A case that arguably shows what meeting the honour of the Crown might mean with respect to compensation is *Guerin v. The Queen*. *Guerin* anchored compensation to the fiduciary obligation of the Crown. Thus, having regard to the fiduciary obligation owed an Indian band by the Crown and the particular circumstances of that case, the Supreme Court of Canada (SCC) applied the principles for the valuation of damages for breach of trust in the assessment of compensation for a breach of the terms of surrender of an Indian reserve.<sup>590</sup> The aim was to discover the *actual loss* of the Indian band as a result of the breach and remedy same by way of compensation. Consequently, the damages should have ordinarily reflected protection of the *expectation interest* appraised in chapter one of this work.<sup>591</sup> This is because considering the facts and circumstances of that case the Crown specifically created an expectation for the Band which the Crown breached. Hence, the *actual loss* should ordinarily be recompensed on the basis of the expectation created.<sup>592</sup>

However, there may be a lack of connection between the reasoning of the SCC and the actual damages awarded. The damages awarded to the affected Indian band seem to represent the protection of a hypothetical *reliance interest* which does not reflect the expectation of the Band. This is because the SCC found no error in principle in the decision of the trial court that approached damages “on the basis of lost opportunity for residential development.”<sup>593</sup> The trial court in that case assessed the loss of the Band on speculation of what they *might* have suffered in a hypothetical

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<sup>588</sup> For this see the introductory section of chapter one. See also *Delgamuukw*, *supra* note 2 at para 203 where the SCC held that compensation for infringement of Aboriginal title should not be equated with the price of a fee simple rather it “must be viewed in terms of the right and in keeping with the honour of the Crown.”

<sup>589</sup> McCabe, *supra* note 175 at 53.

<sup>590</sup> *Guerin*, *supra* note 123 at 357.

<sup>591</sup> See chapter one for the nature and theory of remedies; the various interests remedies seek to protect are examined there.

<sup>592</sup> For the full discussion and appraisal of the *Guerin*, see chapter two of this research.

<sup>593</sup> *Guerin*, *supra* note 123 at 363.



situation rather than what they actually suffered in reality. Thus, the trial court may have aimed to hypothetically put the Indian band in a position they would have been had the infringement not occurred.

This work applauds the reasoning of the SCC in that case as regards the principles for the determination of compensation, but makes a critique of the court's application of the principles they already expounded. This is because their assessment of the damages did not reflect the *actual loss* of the Indian band. More so, the *actual loss* of the Indian band as a result of the omission of the Crown in that particular case could have been discovered by a mathematical formula which the SCC did not apply. This may make the application of the principles as set out in *Guerin* more complex where complicated cases of compensation arise. It is one thing to say that the compensation due to an Aboriginal group is the *actual loss* of the affected group, but it is entirely another task to calculate that loss. The complication lies in the latter.

The above critique is based on the particular facts and circumstances in *Guerin* where a specific expectation was created. In other circumstances where the Crown does not make any specific promise (expressly or impliedly) that creates an expectation, determination of compensation based on the *reliance interest* may actually recompense as far as money can go the actual loss of the Aboriginal group affected.

The valuation of Aboriginal title has over time proven to be complex.<sup>594</sup> The first reason for this seems to be that it is extremely difficult to place a monetary value on the spiritual, cultural and social impact of Aboriginal title. Secondly, Aboriginal title is inalienable except to the Crown. Thus, unlike in fee simple, where upon expropriation, for instance, compensation is based on an imaginary market value of the land where there is a willing buyer and seller, Aboriginal title has only one possible market, and that is the Crown. Hence, it is unclear whether the inalienability of Aboriginal title makes it of less value than fee simple or higher.

What might seem to be possible approaches for the valuation of the economic dimension of Aboriginal title are seen in *Musqueam Indian Band v. Glass* where the SCC was divided as to the

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<sup>594</sup> Mainville, *supra* note 19 at 105. See also Sam Adkins *et al*, *supra* note 10 at 354.

meaning of “current land value” of an Indian reserve.<sup>595</sup> Determination of the value of Aboriginal title is very crucial to the determination of compensation because compensation should ordinarily reflect the value of the right infringed. The approaches in that case only help for the determination of the economic dimension of Aboriginal title. Some of the justices of the Supreme Court valued the Indian reserves through the lens of a hypothetical fee simple value of the land discounted by 50 percent.<sup>596</sup> Others held that the “current land value generally means fee simple value, and common industry practice is to value land by assessing what land would be worth on the open market.”<sup>597</sup> This approach was based on the particular interpretation of the lease agreement in issue.

However, this research endorses the approach of the Bastarache J who held that the land should not be treated as fee simple or valued as such.<sup>598</sup> This appears to be the position of the SCC in *Delgamuukw v. British Columbia*<sup>599</sup> where it was held that fair compensation for infringement of Aboriginal title (which ordinarily should reflect the value) should not be equated with the price of a fee simple, rather it must be viewed in terms of right and in keeping with the honour of the Crown.<sup>600</sup>

This statement by the SCC is only clear to the extent that what amounts to fair compensation for Aboriginal title should not follow the hypothetical market value as in fee simple expropriation cases. However, it leaves uncertain whether the compensation should be higher or lower when compared to a fee simple. Different interpretations could be given to that statement. One could be that Aboriginal title is lower than a fee simple and should not be equated with the price of a fee simple. Another could be that Aboriginal title is higher than the price of a fee simple. The last which may be a more compelling argument is that “it depends on the circumstances of the case.”

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<sup>595</sup> For the full discussion of this, see chapter two. It is pertinent to state that in that case, there was no issue raised as regards the valuation of the non-economic component of the Indian reserve. Hence, the valuation approaches in that case only bear on the economic component.

<sup>596</sup> See the majority decision of Gonthier, Major, Binnie and LeBel JJ in *Musqueam Indian Band*, *supra* note 235 at para 53.

<sup>597</sup> See the dissenting decision of McLachlin C.J. and L'Heureux-Dubé, Iacobucci and Arbour JJ. in *Musqueam Indian Band*, *supra* note 235 at para 18. This is without prejudice to their view that generally speaking, fee simple and Indian reserves are dissimilar land concepts which should not be compared for the purpose of valuation of the latter.

<sup>598</sup> See the judgment of Bastarache J in *Musqueam Indian Band*, *supra* note 235 at para 68.

<sup>599</sup> *Delgamuukw*, *supra* note 2 at para 169.

<sup>600</sup> *Ibid* at para 203.

Thus, the compensation for infringement of Aboriginal title may be higher or lower than the price of a fee simple, depending on the facts and circumstances of the case.

Further to the above, *Delgamuukw* sets out four factors that may make compensation for Aboriginal title vary; which is discussed in Chapter two.<sup>601</sup> After setting out these factors, the SCC declined to address them because the issue of damages was severed from the principal action.<sup>602</sup> This leaves uncertain the possible implication those variabilities may have in practical circumstances.

Also, some scholars argue that modern treaties give an insight to the factors that should determine appropriate compensation that will meet with the honour and good faith of the Crown.<sup>603</sup> This thesis analyzes the compensation aspect of some of the modern treaties to make a recommendation (if found appropriate) for a broader application where Aboriginal title is infringed. Some of the modern treaties list factors to be considered for adequate compensation. Those factors include tangible and intangible factors. What remains uncertain is the implication of those factors in practical circumstances. It is one thing to list factors that may be considered where the issue of compensation arises; it is another to have a mechanism to apply those factors where different situations arise. Hence, it may be difficult to say the implications of the various factors listed in the different modern treaties for the calculation of compensation. However, the factors listed by those treaties touch upon both economic and non-economic components of Aboriginal title.

The examination of *Expropriation Act* shows the mechanism for the calculation of compensation upon expropriation of fee simple. Although it is established in Canada that compensation for Aboriginal title in Canada is not to be equated with the price of fee simple, it is necessary to examine the approach adopted for fee simple to adapt and apply same in the context of Aboriginal title if possible. The focal point for the determination of compensation for expropriation of land rights and interests under fee simple is the market value that a willing buyer might pay a willing seller in an open market.<sup>604</sup> The *market value* principle as defined under the *Expropriation Act* will not augur well with the nature of Aboriginal title because of its inalienability. Its inalienability

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<sup>601</sup> *Ibid* at para 169.

<sup>602</sup> *Ibid* at para 169.

<sup>603</sup> Adkins and *et al*, *supra* note 10 at 365.

<sup>604</sup> *Expropriation Act*, *supra* note 378 at s 26 (2).

makes it available to only one possible market, and that is the Crown. Hence, unless the definition of market value is changed to take into consideration the nature of Aboriginal title, the principles set the *Expropriation Act* may not be useful to the calculation of compensation for Aboriginal title.

Other Acts that touch upon the relevant principles that may help in the determination of compensation are the *Métis Settlement Act*<sup>605</sup> and *First Nation Land Management Act*.<sup>606</sup> Again, these Acts outline pertinent factors that bear on both the economic and non-economic components of Aboriginal title, just like the modern treaties. However, as has earlier been emphasized, knowing the factors to consider is only one limb of the task; having a mechanism to apply same makes the equation balance. It is uncertain how those factors when adopted in a broader context will play out in the calculation of compensation.

Therefore, one can safely conclude that there is a need for the establishment of appropriate legal principles for the determination of compensation for infringements of Aboriginal title in Canada. Such principles should be of such that will take into account the peculiar nature of Aboriginal title and different circumstances that may arise with a particular Aboriginal title. Also, the principles should be of such that would not defeat the purpose of Section 35 of the *Constitution Act 1982* which is the reconciliation between the Crown and Aboriginal peoples and to foster a positive long-term relationship between Aboriginal and non-Aboriginal communities.<sup>607</sup>

Having identified the need for these principles in Canada, this thesis examines the indigenous land rights' compensation mechanisms in Australia, Malaysia and under the *United Nations Declaration on the Rights of Indigenous People (UNDRIP)*.<sup>608</sup> After the examination of these jurisdictions, it is found that there are potential solutions to the complex issue of valuation of compensation for infringement of indigenous land rights. Perhaps, it depends on the approach used to analyze compensation. Where one sees compensation as a remedy that tends to replace a right which has been infringed, then the value of indigenous land rights and interests may be incalculable. However, where one sees compensation as a device to recompense a victim of

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<sup>605</sup> *Métis Settlement Act*, RSA 2000, c M-14 (MSA).

<sup>606</sup> *First Nation Land Management Act*, SC 1999, c 24 (FNLMA).

<sup>607</sup> *Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 S.C.R. 103 at para 10.

<sup>608</sup> *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*, 13 September 2007, A/RES/61/295.

infringement and not necessarily replace an infringed right, then compensation for infringement of Aboriginal title is calculable. The latter seems to capture the aim of compensation.

Finally, it is hoped that the proposals made in this work will be adopted not only in Canada but in other jurisdictions that may have similar issues. Jurisdictions like Nigeria and some other countries in Africa are also yet to develop appropriate principles for the determination of compensation upon the infringement of indigenous land rights. Hence, this thesis might help lay a framework for potential solutions to issues along these lines in several other jurisdictions.

#### **4.2 Possible Framework for the Determination of Compensation for Infringement of Aboriginal Title in Canada.**

This part makes a proposal both to policymakers and the courts for the approaches that should be adopted by Canada to develop the appropriate legal principles for the determination of compensation for infringement of Aboriginal title in Canada. The recommendations here take into cognizance the general nature of Aboriginal title in Canada and the existing principles underlining the relationship between the Crown and Aboriginal peoples. Also, the proposals reflect the need to uphold the underlying spirit of Section 35 of the *Constitution Act 1982* which is reconciliation. However, for there to be true reconciliation in the particular context of compensation for infringements of Aboriginal title, compensation must be on just terms, duly calculated to reflect as far as money can go the actual loss of the Aboriginal group affected. That said, the recommendations are drawn from Australia, Malaysia, *UNDRIP* and the existing circumstances in Canada.

##### **4.2.1 Development of a Legislative Scheme**

One of the ways to bring legal certainty is through legislation. A seemingly inexhaustible uncertainty in a particular area of law can be made clear by legislation. Lon Fuller posits that legal system will fail if the following exist: where the legal system fails to achieve rules; fails to publicize the rules; fails to make rules understandable and the enactment of contradictory rules or introducing frequent changes in the law.<sup>609</sup> His eight principles of law suggest that for a legal system to succeed, the law has to be certain to all and sundry including the judges. Unambiguous

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<sup>609</sup> Lon Fuller, *The Morality of Law*, revised ed (New Haven: Yale University Press, 1969) 21.

rules made public in advance enables parties to predict how the government's power will be exercised and also the actions of other private parties.<sup>610</sup> This enhances making of necessary plans by the parties.<sup>611</sup> Some legal realists see the law as a prediction of the action of a governmental agency or other agency under a given circumstance.<sup>612</sup> Thus, for there to be the rule of law in their opinion, there should be a comprehension of how judges will give a decision to a given circumstance within the scope of the law.<sup>613</sup> It is pertinent to state however that the existence of legislation does not in itself bring legal certainty. For the legislation to bring legal certainty, it should be unambiguous.

The existence of a formal legislative scheme, similar to Australia will increase the certainty and structure as far as compensation is concerned.<sup>614</sup> The idea is not to have a legal framework that is the exact carbon copy of that *Native Title Act (NTA)*<sup>615</sup> in Australia; rather such legislation should address the issues of determination of compensation peculiar to Canada. Although I will propose that Canada should adopt some of the principles of the Australian regime, the examination of the compensation provisions of the *NTA* shows that it is not wholly certain. The implication of those provisions to native title in Australia will perhaps be made clear by the forthcoming decision of the High Court of Australia in *Griffiths v Northern Territory of Australia & Anor.*<sup>616</sup> However, lessons that are worthy of emulation, in my opinion, has already been expounded by the Federal Court of Australia in *Griffiths v Northern Territory of Australia (No 3)*<sup>617</sup>. These principles will be outlined below. This, of course, does not preclude the possibility of drawing from other principles that may be established by the High Court of Australia upon hearing the case.

The legal framework I propose should be legislation as specific as the *SCTA* but with different content. The flaws of the *SCTA* were examined in chapter two. First, the Act does not provide a procedure for calculation of compensation. It mandates the Tribunal to follow the principles of

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<sup>610</sup> Malcolm Lavoie and Dwight Newman, "Mining and Aboriginal Rights in Yukon: How Certainty Affects Investor Confidence" (2015) Online: Fraser Institute 21 available at <https://www.fraserinstitute.org/studies/mining-and-aboriginal-rights-in-yukon-how-certainty-affects-investor-confidence> at 17.

<sup>611</sup> *Ibid* at 17.

<sup>612</sup> Wilfrid E Jr Rumble, "American Legal Realism and the Reduction of Uncertainty" (1964) 13 Journal of Public Law, Emory Law School, 45 at 73.

<sup>613</sup> *Ibid* at 73.

<sup>614</sup> Adkins *et al*, *supra* note 10 at 380.

<sup>615</sup> *Native Title Act 1993 (Cth) (NTA)*.

<sup>616</sup> D3/2018 *Griffiths v Northern Territory of Australia & Anor.*

<sup>617</sup> *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900.

compensation applied by the courts (which this work has shown is undeveloped). Second, the Tribunal cannot grant compensation for the non-economic dimension of indigenous land rights. Other flaws of the Act were explored in chapter two.

Before delving into the content of the legislative scheme, which will be proposed subsequently, it is important to ponder briefly about how the scheme may come about and the approach it will use to address the issue of compensation. First, it is pertinent to state that the question of constitutional jurisdiction of provinces to infringe and regulate Aboriginal and treaty rights has been a reoccurring theme both between scholars and the courts since the constitutional protection of those rights.<sup>618</sup> This is not part of the investigation of this research as same might lead to broader questions that are beyond the scope of this work.

That said, Mainville is of the view that the power to make this sort of legislation should be within the exclusive jurisdiction of the federal legislature as it touches upon matters relating to the core of “Indians, and Lands reserved for the Indians” under section 91 (24) of the *Constitution Act, 1867*.<sup>619</sup> Thus, a law that is to establish the principles for the determination of compensation for the infringement of Aboriginal title should be within the exclusive jurisdiction of the parliament.<sup>620</sup>

Further, he suggests that rules to be set for the determination of compensation should apply uniformly in Canada.<sup>621</sup> This submission is made on the basis that it may be difficult to reconcile the honour of the Crown where the principles for the determination of compensation vary across provinces.<sup>622</sup> This proposal should be applauded. However, the uniform rules should be of such that will accommodate the variance that could be encountered with the particular nature of different lands subject to Aboriginal title. This is because the actual loss of an Aboriginal group affected by an infringement may not be appropriately assessed where the particular nature of the Aboriginal title is not taken into contemplation.

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<sup>618</sup> For this see Kathryn L. Kickbush & Debbie Chan, “Provincial Jurisdiction to Infringe Aboriginal Rights” (2005) 63:6 The Advocate 881; Thomas Isaac, “Provincial Jurisdiction, Adjudicative Authority and Aboriginal Rights: A Comment on Paul v. B.C. (Forest Appeals Commission)” (2002) 60:1 The Advocate 77. See also *Delgamuukw*, *Supra* note 3 at para 181; *Paul v. British Columbia (Forest Appeals Commission)* [2003] 2 S.C.R. 585.

<sup>619</sup> Mainville, *supra* note 19 at 115. See also *Delgamuukw*, *supra* note 2 at para 181; *Paul v. British Columbia (Forest Appeals Commission)* [2003] 2 S.C.R. 585.

<sup>620</sup> *Ibid* at 115.

<sup>621</sup> *Ibid* at 115.

<sup>622</sup> *Ibid* at 115.

The subsequent proposals shall state principles that should form the contents of the proposed legislative scheme. However, even if the government does not adopt the proposal for a legislative framework, the subsequent proposals are potential solutions to the issue of compensation which judges may still follow as persuasive authority. The only suggestion that may need a legislative action is the proposal for the use of assessors in the determination of compensation which is discussed below.

#### **4.2.2 Bifurcated Approach of Calculation of Compensation**

This forms the core of my proposal for the appropriate principles to inform the compensation for infringement of Aboriginal title. The adoption of this approach separates the incalculable component of the value of Aboriginal title from the calculable component. The danger of a holistic measurement of the value of the infringed rights and interests in land subject to Aboriginal title is that the rights and interest become wholly incalculable. Hence, in practical terms, the solution to that danger is to separate the calculable component from the incalculable component; calculate the value of the calculable component and grant a *solatium* for the incalculable component.

This approach was the approach adopted by the trial court in *Griffiths*, and it may appropriately be applied in Canada. Aboriginal title contains a tangible economic element which I will make the case that it is calculable where the principles I will expound subsequently are followed. Furthermore, it has a non-economic dimension in the light of its cultural and spiritual significance. Undoubtedly, the non-economic component is a right and should not be left “not remedied.” However, the complication is that the value is incalculable. The *bifurcated approach* suggests that for the purpose of compensation, the economic loss is calculated differently from the non-economic loss. I shall proceed to propose how this will be done in a Canadian context.



### a) *Economic Component*

It is pertinent to draw the line with respect to where the economic component of Aboriginal title stops for the purpose of calculating the economic loss. This is important in order not to conflate economic losses with some aspects of non-economic losses. The economic component of Aboriginal title signifies its tangible component which can be deduced from the tangible rights it confers. It has gone beyond arguments that “Aboriginal title confers ownership rights similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land.”<sup>623</sup>

For the economic component of Aboriginal title, Canadian jurisprudence analogizes it with that of a fee simple. Consequently, one can propose that the calculation of the economic loss occasioned by the infringement of Aboriginal title should follow the rules of compensation for expropriation of fee simple. On the contrary, adoption of the exact approach for compensation in cases of expropriation of fee simple may be counter-productive as same is not compatible with general nature of Aboriginal title. The core for the calculation of compensation in expropriation fee simple cases in Canada is the *market value of the interest expropriated* which is the amount a willing seller might be willing to pay for such property in the open market.<sup>624</sup> It has been emphasized in chapter two and three of this work that Aboriginal title is inalienable; consequently, it is not available to an open market. The only market for Aboriginal title is the Crown.

Further to the above, the *market value* principle used for calculation of compensation in fee simple will not augur well with Aboriginal title. The solution to this complication may reasonably be straightforward. The definition of *market value* under the *Expropriation Act* refers to the kind of market that fee simple is open to. In line with that, *market value* principle will be compatible with the situation of Aboriginal title where it is defined with respect to its only market. Therefore, the definition of *market value* concerning the economic loss occasioned by the infringement of Aboriginal title should focus on the value reasonably obtainable (not necessarily obtained) by the Crown from such infringement. This was the approach adopted by the trial judge in

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<sup>623</sup> *Tsilhqot'in Nation*, *supra* note 6 at para 73.

<sup>624</sup> *Expropriation Act*, *supra* note 378 at s 26 (2).

*Griffiths*.<sup>625</sup> Adoption of this approach will also make the argument of “whether or not the inalienability of Aboriginal title is a discounting factor to its worth” irrelevant. The real *market value* of Aboriginal title could be said to be the best use the Crown in fulfilling its fiduciary obligation could have put a land subject to Aboriginal title assuming if it is surrendered by the group involved. In some circumstances, the best use may be sale of the land.

Different factors could make the compensation for economic losses vary in different circumstances. This is not just peculiar to Aboriginal title. The factors that will affect the compensation for economic losses are the same as those that will affect its market value; in this case, the factors that will either increase or decrease the value obtainable by the Crown. These factors may include size, location, developments on the land, etc. Another factor that will, of course, affect compensation is the degree of infringement. The degree of infringement can be said to be directly proportional to the loss. Thus, the higher the infringement, the higher the loss and consequently, compensation should be higher.

It is pertinent at this juncture to address the potential effects the restrictions on Aboriginal title might have on its market value and consequently compensation. My respectful view as I have argued in several parts of this thesis is that the restrictions should not be discounting factors to the value of Aboriginal title. It is important to emphasize this point here and clarify the reasons for my contention.

As earlier discussed in chapter one, Aboriginal title come with some restrictions:

1. It can only be held communally, not only for the present generation but also for all succeeding generations.<sup>626</sup>
2. It is inalienable except to the Crown<sup>627</sup>
3. It cannot be developed, used or misused in a way that would prevent the future generation from using and it.<sup>628</sup>

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<sup>625</sup> *Griffith 1*, *supra* note 474 at para 215.

<sup>626</sup> *Tsilhqot'in Nation*, *supra* note 6 at para 74.

<sup>627</sup> *Ibid* at para 74.

<sup>628</sup> *Ibid* at para 74.

Since I hold the view that the above restrictions are not discounting factors, I shall address the effects of the restrictions jointly rather than disjunctively.

The majority decision of the SCC in *Musqueam Indian Band* held that the legal restrictions on an Indian reserve should affect its market value.<sup>629</sup> This decision is principally based on two reasons. First, the Musqueam land is not available in any actual market and secondly, in line with the appraisal of freehold property practice in Canada, to determine the value of land, legal restrictions should be considered.<sup>630</sup>

Application of principles applicable to freehold property to Aboriginal title without adapting it to the peculiarities of the latter may not be the best approach for developing principles that should govern Aboriginal title. Aboriginal title should not just be said to be *sui generis* in principle only for the usual principles of freehold to be applied to it in practical circumstances.

In 1996, the National Native Title Tribunal of Australia posed pertinent questions which may be instructive to the ongoing discussion:

...[I]t would be conceptually difficult and, on the evidence in this case, practically impossible to express the actual nature of the native title rights as a percentage of freehold. Conceptually, it is difficult to adequately compare the nature of native title rights with free simple rights. For example, if an integral component of ordinary fee simple title is the right of the owner to alienate the land and if an integral component of native title is that it cannot be alienated (or that it can only be transferred in limited circumstances to a limited class of transferees)...how can such a comparison be made? By reference to those components alone, is native title said to be more valuable, as valuable as or less valuable than fee simple title? That question is merely indicative of the difficulties inherent in a comparison of unlike rights and interests.<sup>631</sup>

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<sup>629</sup> *Musqueam Indian Band*, *supra* note 235 at paras 47, 65 & 53.

<sup>630</sup> *Ibid* at paras 47 & 49. The SCC relied on the Appraisal Institute of Canada, *The Appraisal of Real Estate*, Canadian ed. (Winnipeg: The Institute, 1999).

<sup>631</sup> *Western Australia v. Thomas* (1996) 133 FLR 124 at 202. See also Bartlett, *supra* note 442 at 792.

Comparison of principles between two unlike rights and interests may not in itself be erroneous but such must be done circumspectly taking into consideration the peculiarities of the different rights and interests. If this is not done, the comparison may have an erroneous outcome. For instance, the majority in the SCC in *Musqueam Indian Band* took the view that Musqueam land is not available in any actual market. This view may seem to make sense when one defines “market” through the lens of the conventional market tenable for freehold properties. However, upon consideration of the peculiarities of indigenous land rights and interests, one will discover that the view may not be accurate. This is because, as I have argued earlier, the Crown is the special market for lands subject to Aboriginal title and different rules should apply for this special market. More so, the Crown playing the role of a fiduciary should ordinarily put the land to the best use on behalf of the Aboriginal group affected. It is the value for such use that should be the market value of the economic component of Aboriginal title. Thus the restriction on the alienation of Aboriginal title except to the Crown should not be a discounting factor in the determination of the value.

A similar issue came up in the *Geita Sebea v. Territory of Papua*<sup>632</sup> before the High Court of Australia in 1941. The issue before the court was whether the provision of the *Land Ordinance 1911—935* restricting the rights of an indigenous group to sell or deal with the land affects its value.<sup>633</sup> The court answered in the negative.<sup>634</sup> This was the case that the primary court in *Griffiths* relied upon.

The remaining restrictions on Aboriginal title should not also be discounting factors in its valuation. There are two reasons for this contention. What might seem to be the weaker reason is a question. Would it have made any difference if there were no further restrictions? It worthy of note while pondering on this question that the rights Aboriginal title confers extend to the right to decide how the land will be used including modern usages; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to proactively use and manage the land.<sup>635</sup> The view that the remaining restrictions are discounting factors raises a more complex question; what in particular is to be discounted? One may argue that the restrictions may limit the developments the lands can be put to and consequently

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<sup>632</sup>*Geita Sebea v. Territory of Papua* (1941) 67 CLR 544.

<sup>633</sup> *Ibid* at 555.

<sup>634</sup> *Ibid* at 555.

<sup>635</sup> *Tsilhqot'in Nation*, *supra* note 6 at para 73.

reduce the value. Well, in as much as this line of argument might seem to make sense, it is quite speculative, as all Aboriginal title lands are not the same. And what might amount to use or misuse in a way that would prevent the future generation from using a land subject to Aboriginal title in a particular circumstance may not amount to same in another circumstance. Chapter one of this thesis has argued that that the scope and content of the cultural limit on Aboriginal title are uncertain. Hence, the better approach to the valuation of Aboriginal title is to consider the particular nature of an Aboriginal title land which may vary and not hold the rigid view that the restrictions are discounting factors to its value.

The stronger reason for my contention is “fairness.” Contending that the restrictions are discounting factors to the value of Aboriginal title is like allowing the Crown benefit from its wrong. These restrictions exist precisely because of the Crown’s actions in the first place; the Crown is the only market for Aboriginal title, and the Crown is also the infringer.

That said, the *market value* principle, when defined to address the peculiar nature of Aboriginal title as illustrated above, is ideal for situations of justifiable infringements or past unjustified expropriation of rights and interests in land subject to Aboriginal title. However, there are instances that other valuation principles may be ideal in deciphering the economic loss of an affected Aboriginal group. A good example of such circumstance is the experience in *Guerin* where the Crown breached the terms of surrender of an Indian reserve. This kind of situation is different because it is akin to a contract (although not necessarily one) where the Crown through its express or implied promise creates an expectation of economic benefits on the minds of the Aboriginal group. Consequently, the valuation for compensation in such an instance should be to the extent of the expectation created. In this kind of situation, the fact that the expectation created by the Crown is unreasonably higher than the “*market value*” of the land should not be a defence. For this to work there should be three tests to activate measurement by *expectation principle*:

1. It must be in a situation of voluntary surrender of rights and interests in land subject to an Aboriginal title.
2. The Crown must have expressly or impliedly made a representation to give the indigenous group affected an expectation of economic benefits.

3. The Aboriginal group must have relied on the express or implied representation of the Crown to make the surrender.

The analysis under this section shows that the compensation for economic losses should either seek to protect the reliance interest or in appropriate circumstances as outlined above seek to protect the expectation interest. The *market value* analysis seeks to ascertain the value of loss so as to award compensation that will as far as money can go recompense for the actual loss. This represents the reliance interest because it looks back to as far as money can go put the Aboriginal group affected in a position they would have been had the infringement not happened. It does not necessarily look at the gain of the infringer. The reference to the “value reasonably obtainable by the Crown from such infringement” does not necessarily mean looking at the gain of the infringer. That allusion is used for the ascertainment of the *market value* of the Aboriginal title as the Crown is the only available market for it.

#### ***b) Non-Economic Component***

The non-economic component of Aboriginal title is the intangible spiritual and cultural connection that Aboriginal groups have in their lands.<sup>636</sup> It is extremely complex to assess the value of the losses probably because it is not available in both open and closed markets. The value can only be deciphered by its significance to Aboriginal groups, and same cannot be readily converted to currency. However, this component of Aboriginal title is a right which is compensable. The essence of the compensation is not to replace the infringed intangible right (because it cannot); rather it is a monetary recompense to make amends for the harm done.

The approach adopted by the trial court in *Griffiths* is worthy of emulation. The court awarded compensation by way of *solatium*. It describes *solatium* to be the compensation component that represents the loss or diminution of connection or traditional attachment to the land, and not necessarily the value.<sup>637</sup> In a Canadian context, the factors that should ideally be considered by the courts in the grant of *solatium* are the particular nature of Aboriginal title, the nature of the infringement, the degree of infringement and the degree of accommodation. The factors to be considered to inform the *solatium* should be restricted to the intangible component of Aboriginal

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<sup>636</sup> *Delgamuukw*, *supra* note 2 at para 129.

<sup>637</sup> *Griffiths I*, *supra* note 474 at para 307.

title. For instance, when considering the particular nature of Aboriginal title in this context, it should be restricted to perhaps the degree of connection that a group has in their lands. Hence, the higher the degree, the higher the *solatium*. Again, there might be no compensation that will replace the slightest degree based on its significance; but the essence of the compensation is for recompense and not necessarily replacement.

The kind of amount that may be awarded as *solatium* will vary depending on the circumstances of the case. This may be a complex issue as it may be difficult to find a particular reference that has the attributes of the non-economic component of indigenous land rights and interests to draw from. However, the experience in Australia gives an insight on the varying circumstances that may affect *solatium*.

In *Griffiths*, the *solatium* of \$1.3 Million was awarded after considering the particular nature of indigenous interest and the degree of spiritual and usufructuary significance of the land.<sup>638</sup> In that case, the particular nature of the indigenous rights and interest in land was non-exclusive. The amount granted should have ordinarily been higher had the interest been exclusive. Also, in awarding the *solatium*, the court in *Griffiths* considered the size of the land.<sup>639</sup> This presupposes that the larger the area of land infringed, the higher the *solatium*.

In Canada, for Aboriginal title to be established, the occupation of the land before the assertion of European sovereignty must be sufficient, continuous (where present occupation is relied on) and exclusive.<sup>640</sup> Therefore, Aboriginal title in Canada is an exclusive interest in land and quite distinguishable from the situation in Australia where native title may be non-exclusive. Drawing from the experience in *Griffiths*, the award of *solatium* in Canada should ordinarily be higher than the award in *Griffiths* for land of similar size.

The complexities that may arise in the determination of appropriate *solatium* gives rise to a need for the appointment of assessors who are versed in the nature of Aboriginal title to be involved in

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<sup>638</sup> *Ibid* at paras 301 to 302.

<sup>639</sup> *Ibid* at paras 301.

<sup>640</sup> *Tsilhqot'in Nation*, *supra* 6 para 25.

the determination of compensation for infringements of Aboriginal title. This will be addressed in below.

The analysis in this section shows that compensation for the non-economic loss is more in line with compensation based on the reliance interest.

#### **4.2.3 Assessors**

The *bifurcated approach* expounded above shows how economic losses and non-economic losses occasioned by an infringement are to be valued disjunctively. The missing piece to the puzzle is the mechanism to be used to arrive at the appropriate value in each case. This is premised on the ground that judges or the government (in negotiated compensation) may not be versed in the particular nature of the Aboriginal title. A plausible way to fill this gap is to appoint assessors who are versed in the nature of Aboriginal title to aid the judges or the government in the assessment of both the economic and non-economic losses occasioned by the infringement. This approach should form part of the legislative framework earlier proposed.

The principle of using Assessors is drawn from *Federal Land Acquisition Act (LAA)* of Malaysia.<sup>641</sup> The role of the assessors is to sit with the trial judge, hear the case with him and make reports that will inform the court's decision. Assessors play a different role from expert witnesses.

The attachment of assessors to judges is an approach that belongs to the broad category of the concept of "lay participation in the administration of justice."<sup>642</sup> There are other types of lay participation; the most prominent example is the jury system where a group of people is chosen at random to decide a case.<sup>643</sup> Assessors function differently, as they do not get to give the decision in the case. They only guide the judges to arrive at their decisions.

Unlike expert witnesses, assessors sit in a judicial capacity. They form part of the decision making body as their reports may inform the decision of the courts. Hence, they see things from the perspective of judges but this time with the requisite knowledge of the particular nature of

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<sup>641</sup> *Land Acquisition Act*, Act 486, 1960 (LAA) at s 40A.

<sup>642</sup> Sanja Kutnjak Ivkovic, "Exploring Lay Participation in Legal Decision-Making: Lessons from Mixed Tribunals" (2007) 40:2 Cornell International Law Journal at 429.

<sup>643</sup> See Harry Kalven, Jr. and Hans Zeisel, *The American Jury* (Boston: Little, Brown and Company. 1966) at 5.



Aboriginal title. The advantage is that persons with the requisite knowledge of the economic and non-economic components of Aboriginal title are sitting in a judicial capacity. The appointment of assessors will not disrupt the normal course of events in the court. On the contrary, it complements the procedure in the court into ensuring that the right decision is arrived at. The assessors will not be saddled with the responsibility of the judge (to give the final decision). Their duty will be restricted to sitting with the judge and making of reports after that. The reports may inform the decision of the court.

The use of assessors will promote community values and local knowledge in the administration of justice and consequently ensure justice and equity.<sup>644</sup> It may be a good way to bring in Aboriginal perspective in the determination of compensation.

The appointment of the assessors (ideally not less than two in number) should be made by the Court on the recommendation of the parties. The qualification should ordinarily be that the persons should have a track record which shows expertise in issues concerning Aboriginal title, especially relating to the particular nature of the subject matter of the suit. Also, to ensure that Aboriginal perspectives are employed in the determination of compensation, strong efforts should be made to appoint indigenous peoples as assessors.

It is pertinent to say that the reports of the assessors should not be automatically binding until the judge officially adopts it into his decision. More so, the judge may adopt the reports with such modifications, addition or subtraction as may be necessary to ensure that compensation is on just terms. Finally, if there is a conflict between the reports of the assessors, the judge should give his decision by adopting the report (or aspects thereof) which better serves the interest of justice.

There may also be the need for assessors during out of court negotiations for compensation between the government and the affected Aboriginal community. Their duty in this instance will be to make reports to the government that will inform the appropriate level of compensation for infringement of Aboriginal title.

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<sup>644</sup> Ivkovic, *supra* note 642 at 431.

#### 4.2.4 Fiduciary Principles

Robert Mainville suggests that compensation should be determined with a mechanism that takes cognizance of the principles of fiduciary law.<sup>645</sup> This suggestion is made because the framework of compensation for expropriation of private land rights is inappropriate to address the *sui generis* nature of Aboriginal title.<sup>646</sup>

It appears that the position of the law in Canada already is that expropriation principles used for compensation in fee simple are not directly applicable to Aboriginal title. The SCC made this clear in *Delgamuukw* where it was held that compensation should not be equated with the price of a fee simple rather it must be viewed in terms of the right and in keeping with the honour of the Crown.<sup>647</sup> It also appears (although not codified) that the extant principle for the determination of compensation for infringement of Aboriginal title in Canada centers on fiduciary principles as expounded in *Guerin*.<sup>648</sup> This is based on the general fiduciary obligation that the Crown owes Aboriginal peoples in its dealing with them.

That said, Chapter two of this work shows that the award of remedy using “fiduciary principles” is very broad. Thus recommending that compensation should be based on fiduciary principles is apt. However, if a definite explanation is not given concerning the practical mechanism to be used to decipher the appropriate compensation where “fiduciary principles” are used, the situation will still be uncertain. It has earlier been submitted in chapter two that the general options available for remedy anchored on fiduciary principles may be the implementation of a constructive trust, monetary restitution, an award of equitable damages or an accounting for profits (or a combination thereof).<sup>649</sup> For instance, where a fiduciary makes a wrongful gain as a result of his position, the victim of wrong may claim for restitutionary remedies, even where he suffers no loss.<sup>650</sup> For compensation however and in general terms where fiduciary relationships concern real property,

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<sup>645</sup> Mainville, *supra* note 19 at 104.

<sup>646</sup> *Ibid* at 105.

<sup>647</sup> *Delgamuukw*, *supra* note 2 at para 203.

<sup>648</sup> See also *Semiahmoo Indian Band*, *supra* note 232 at 25; *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 S.C.R. 746, 2001 SCC 85; *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344.

<sup>649</sup> *Ibid* at 25.

<sup>650</sup> *Canadian Aero Service Limited v. O'Malley* [1974] SCR 592 at 621-622.

the measure of compensation is the *actual loss* caused to the estate without a need for proof of foreseeability and causation.<sup>651</sup>

The objective of the preceding recommendations is to design a mechanism for the determination of the *actual loss* of an Aboriginal community whose rights and interests in their land are wholly or partly infringed. Therefore the proposals for the establishment of a legislative scheme, use of a *bifurcated approach* and the appointment of assessors are all to fulfill the objective of measurement of compensation in line with the *actual loss* of the affected Aboriginal community. It is obvious that the *actual loss* may be incalculable, especially as it relates to the non-economic component of Aboriginal title. However, the objective is to determine compensation that will as far as money can go recompense the *actual loss* of the affected Aboriginal community. That said, the proposals made here do not in any way preclude the application of fiduciary principles; they actually clarify the mechanism for the application of fiduciary principles into the actualization of the appropriate compensation as situations arise.

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<sup>651</sup> *Fales v. Canada Permanent Trust Co.* [1977] 2 SCR 302 at 320. See also David Hayton, Paul Matthews and Charles Mitchell, *Underhill and Hayton: Law of Trusts and Trustees*, 18<sup>th</sup> ed. (London: LexisNexis, 2010) at 1113.

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